Supreme Court, U.S.
FILED

No. 03-1268 MAR 8 2004

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In The

Supreme Court of the United States

CITY OF ANAHEIM, A California Municipal Entity; ANAHEIM POLICE DEPARTMENT, A California Municipal Entity; ROGER BAKER; CHRISTOPHER NED; KRISTI VALENTINE; BRIAN MCELHANEY; GREGORY SAWYER,

Petitioners,

vs.

BRIAN THOMAS DRUMMOND, by and through his guardian ad litem THOMAS R. DRUMMOND,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit extended the concept of "clearly established law" beyond the bounds established by this court in *Wilson v. Layne*, 526 U.S. 603, 617-618 (1999) and *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987) when it characterized officers' weaponless, impact free restraint as excessive and "severe force likely to cause death" based on disputed theory of "positional asphyxia" in determining a Fourth Amendment violation, based on its own construction of out of circuit precedent in contradiction of prevailing law in other Federal Circuits and only published precedent within the jurisdiction had recently "debunked" theory of "positional asphyxiation"?

2. Whether Ninth Circuit's use of "post hoc" analysis based largely on plaintiff's comatose condition to reverse the district court's grant of summary judgment for the officers on the issue of qualified immunity for their use of otherwise minimal restraint of a psychotic detainee in a handcuffed prone position is erroneous derogation of *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 151 L. Ed. 2d 272 (2001) and *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), where prevailing Federal Circuit precedent found no constitutional violation and/or granted qualified immunity under similar circumstances?

3. Whether the Ninth Circuit Court of Appeals subverted the standards of review on summary judgment set by this court in *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S. Ct. 1348 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) by its exclusive

QUESTIONS PRESENTED – Continued

reliance on a plaintiff's sole witness' unsworn conclusion to raise a triable issue of fact of plaintiff's resistance to officers to deny summary judgment where contrary facts were supported by voluminous sworn testimony of eyewitnesses and plaintiff's own admission that he kicked an officer attempting to restrain him?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Defendants, City of Anaheim, Anaheim Police Department, Roger Baker; Christopher Ned, Kristi Valentine, Brian McElhaney; Gregory Sawyer as Petitioners herein and Plaintiff, Brian Thomas Drummond, by and Through His Guardian Ad Litem Thomas R. Drummond as Respondents herein.

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The Order of the Ninth Circuit Court of Appeals' Opinion Denying the Petition for Rehearing and Rehearing En Banc was filed November 4, 2003, reprinted in Appendix hereto App. 35. The Memorandum Opinion of the Ninth Circuit Court of Appeals filed September 10, 2003 is reported at 343 F.3d 1052 (2003) and is attached in Appendix hereto App. 1. The United States District Court's Order Granting Summary Judgment is attached hereto in Appendix App. 23. The Statement of Uncontroverted Facts and Conclusions of Law as modified and adopted by the United States District Court is attached in Appendix hereto App. 27.

JURISDICTION

This petition is timely filed pursuant to the Court's order signed by Justice Sandra Day O'Connor dated January 8, 2004 granting petitioner's request for extension of time to file this petition to and including March 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved in this case is 28 U.S.C. Sec. 1983. The language of the statute is included *verbatim* [App. 36] and the pertinent portion quoted below:

"§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

Plaintiff Brian Drummond, age 34, had been abusing himself with cocaine, methamphetamine, alcohol and other substances since the age of fourteen. This apparent addiction brought about the unfortunate turn of events from which this case emanates.

Mr. Drummond's girlfriend summoned police on March 25, 1999, for assistance in bringing him to a medical facility for evaluation under California Welfare and Institutions Code §5150. At that time, officers did not find Drummond to meet the criteria for involuntary submission for evaluation, but they were able to persuade him to go voluntarily with his girlfriend, Olivia Graves, to a medical facility to obtain his lithium medication. The following night, officers were again summoned, this time by a neighbor who advised that Drummond was violent, hallucinating and had suicidal ideations.

When officers Brian McElhaney, Kristi Valentine and Christopher Ned located Drummond, he was sweating, incoherent and hallucinating. The officers contacted Drummond's girlfriend, Olivia Graves, who refused to have further involvement with him. Officers determined Drummond met the criteria under §5150, attempted to

take Drummond peaceably into custody and requested an ambulance for transportation.

Drummond struggled with McElhaney, Valentine and Ned for 15-20 minutes, kicking and yelling profanities. When a fourth officer, Greg Sawyer, arrived, Drummond kicked Sawyer away as he attempted to assist in controlling Drummond's legs. Sawyer was able to use ankle restraints to immobilize Drummond, but he was not hog-tied. As soon as the leg restraints were placed on Drummond's ankles, Drummond suddenly became docile. Officers realized he was not conscious and immediately called paramedics and began resuscitation efforts. Drummond was stabilized and transported to the hospital. He currently remains in a coma.

Drummond claims (through his guardian ad litem) that he was asphyxiated by the defendant officers when they placed him face down, with handcuffs on. The defendants contend that Drummond's injuries were the result of the effects of the combined alcohol and drugs that Drummond had consumed. It is not uncommon for persons to have a heart attack or suddenly stop breathing as the result of persistent abuse of cocaine, even among the most fit athletes, without any intervening contact with police or trauma. There is varying testimony concerning exactly what physical position the officers and Drummond were in – and when. It is undisputed, however, that the police did not strike or kick Drummond or use any weapon on him. The emergency room physician who examined Drummond found no evidence of trauma to Drummond's head, neck or torso.

Notwithstanding the dispute over the cause of Drummond's sudden loss of consciousness, defendants sought

summary judgment on the basis that, under *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 151 L. Ed. 2d 272 (2001), their actions were not unconstitutional and that the issue to be decided on summary judgment is not which medical theory is correct, since police officers are not doctors. The issue presented by defendants was whether, as a matter of law, their restraint of Drummond violated any established constitutional right of Drummond and if so, whether a reasonable officer in the same circumstances could have believed that his or her actions were lawful, given an allowance for mistake in a rapidly evolving, dangerous encounter.

The District Court granted defendants' Motion for Summary Judgment and entered judgment on January 22, 2002. The District Court adopted in its entirety, with slight modifications, Defendants' Statement of Uncontroverted Facts and Conclusions of Law [App. 27]. Defendants' Motion for Summary Judgment was premised primarily on undisputed facts provided by the deposition testimony of Drummond's fiancee, Olivia Graves, the affidavit of emergency room physician, John Reid M.D., the emergency room records and report of Dr. Reid and the deposition testimony of the four officers and percipient witness, David Kimbrough, Drummond's neighbor and reporting party who had summoned officers to the scene on March 26, 1999. The crux of Drummond's opposition was the statements of a bystander, Victor Calleja ("Calleja"). Calleja's sworn statement does not dispute Drummond's resistance of the officers, however, a second, *unsworn* conclusory statement by Calleja in an investigator's report that Drummond was "not resisting" was submitted as part of Drummond's opposition, which defendants objected to as inadmissible hearsay [App. 51].

The undisputed facts adopted by the District Court [App. 27, 31] were that the plaintiff, Brian Drummond ("Drummond") was violent, hallucinating and threatening to himself and to others on the evening of March 26, 1999, when police were called out and encountered Drummond near the 7-11 store at the busy intersection of Magnolia and Broadway. When police arrived on March 26, 1999, they enlisted the assistance of Drummond's fiancee and attempted to gain cooperation of Drummond to escort him to a medical facility for evaluation to no avail. Police used force to restrain him in order to prevent him from running into the traffic on Magnolia Street. Drummond refused to go in the patrol car and he resisted police as they awaited the ambulance which they had requested for transport. Drummond continued to struggle with police until a fourth officer arrived and assisted by placing leg restraints on Drummond to keep him from kicking, whereupon Drummond became suddenly docile. Witnesses standing from 10-30 feet away saw Drummond struggling and heard Drummond yelling and cursing and police telling him to stop fighting right until the moment he suddenly stopped struggling. At no time did police hit, kick, strike or use any weapon on Drummond. Evidence submitted by defendants in a sworn statement established that Dr. John Reid, the emergency room physician who examined Drummond, found no signs of trauma to his head or neck area and no signs of trauma or abrasions to his entire torso [App. 37]. Toxicology tests and his fiancee's testimony later confirmed his intoxication from cocaine and alcohol [App. 27].

On appeal, the Ninth Circuit reversed summary judgment that was granted by the United States District Court for the Central District of California for defendants and remanded the case for trial. The Ninth Circuit found

the officers' continued restraint of Drummond unnecessary and constitutionally excessive. In reaching this determination, the Ninth Circuit adopted Drummond's contention that he was not resisting the officers based exclusively on the unsworn conclusion[1] of Drummond's solitary witness, Calleja. The court omitted any reference whatsoever to *Drummond's own admission* that he kicked an officer or the other voluminous and overwhelming evidence of his resistance, consisting of the deposition testimony of the four officers and Kimbrough's detailed deposition testimony describing how Drummond was vigorously resisting, kicking, yelling loud enough to be heard from 10-30 feet away and cursing at the officers *until the moment he lost consciousness*.

The Ninth Circuit concluded that the officers violated "clearly established law" when they continued to restrain Drummond after he told them he could not breathe. In so finding, the Ninth Circuit focused on and adopted as fact Drummond's expert's theory of "positional restraint asphyxiation", citing the fact the officers had been provided "training bulletins" documenting the evolving legal decisions and case studies involving the nearby San Diego police department and use of the hogtie restraint documented in *Price v. County of San Diego*, 990 F. Supp. 1230, 1998 WL 1607 (S.D. Cal. 1998). Although no case law

[1] Although the Ninth Circuit opined that defendants waived objections in the District Court to the plaintiff's introduction of this conclusory statement which was contained in an unsworn investigator's summary of a telephone interview, the record reflects that defendants filed a timely notice of objection to Calleja's unsworn statement and other inadmissible hearsay with the District Court in reply to plaintiff's opposition to the motion for summary judgment [App. 51, 55].

established such a theory based on restraint with body pressure alone and recent case law explicitly had retracted the theory of positional restraint asphyxiation, the Ninth Circuit dismissed the existing law on this issue within the jurisdiction and ignored uncontested evidence of obvious precipitating factors such as plaintiff's cocaine and alcohol intoxication and combative behavior to advance this theory in the Ninth Circuit's first case on this issue, which it published.

By their post-hoc reasoning characterizing the weaponless, impact free restraint of a combative, hallucinating man as "severe force reasonably likely to cause death", the Ninth Circuit panel of Judges Reinhardt, Browning and Pregerson have contravened the precedent of this court in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 151 L. Ed. 2d 272 (2001) and have deprived police in the Ninth Circuit of non-lethal, weaponless, impact free method of restraint of combative detainees uniformly utilized in similar situations throughout the country. This new precedent contradicts the precedent established in the Fifth, Seventh, and Eighth Circuit Courts of Appeal and the precedent followed in the District Courts in the Third, Tenth and Eleventh Circuits that such restraint does not violate clearly established law, particularly where there is no hogtie (tying together the hands and feet behind the back) and there is constant monitoring.

The practical effect of the Ninth Circuit's decision is to impose a *new standard* on police officers in the field when restraining individuals exhibiting signs of drug or alcohol intoxication or other forms of psychotic behavior based upon a disputed theory of "positional restraint asphyxia" which even the most learned forensic experts in the medical community cannot agree upon today and remains

the subject of conflicting circuit opinions, in conflict with one of the most fundamental expressions of constitutional standards set forth by this court in *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve the Split of Authority in the Circuit Courts Created by the Ninth Circuit's Opinion That Police Officers' Weaponless, Impact Free Restraint of a Psychotic or Drug Impaired Detainee in a Handcuffed and Prone Position Is Excessive Force Because of the Danger of "Positional Asphyxia" under Clearly Established Law.

The Ninth Circuit's opinion contradicts the prevailing view among most of the Federal Circuits concerning the manner of restraint that is constitutionally acceptable for police officers when they are required to detain or arrest persons exhibiting symptoms of a psychotic episode in derogation of standards of review of police conduct instituted by this court in *Hunter v. Bryant*, 502 U.S. 224, 227-228 (1991), *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), and most recently, in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 151 L. Ed. 2d 272 (2001).

In their own view of what is "clearly established law", the Ninth Circuit imposed an obligation on police officers to recognize a controversial theory of positional asphyxiation which, in the Ninth Circuit had been retracted in *Price v. County of San Diego*, 990 F. Supp. 1230, 1998 WL 1607 (S.D. Cal. 1998) and continues to be disputed and the

subject of spirited debate in the medical and police community.

Officers in Anaheim had been informed by a training bulletin of the decision in *Price v. County of San Diego, supra*, in which the theory of positional asphyxiation had been expressly invalidated in 1998, just a few months before this incident occurred in March, 1999. At that time, the focus on the theory of "positional asphyxiation" involved whether the use of the "hogtie" or "four point restraint" was constitutionally excessive force. Although there is no evidence whatsoever that Drummond was hogtied, the court in *Price, supra*, held that officers' restraint of a man in a prone position, including hogtying, was not excessive force:

> "Plaintiffs' argument that the deputies should have taken precautions because of the dangers of hogtying obviously fails. The UCSD study has shown the dangers to be fictitious, which obviates the need for precautions." (emphasis added) *Price v. County of San Diego* (1998) 99 F. Supp. 1230, p. 1237-1239.
>
> "Since *Price*, no court has challenged this conclusion, and at least one has endorsed its findings. See *Sims v. Greenville County*, 2000 U.S. App. LEXIS 6846, 2000 WL 380122, at *3 n.6 (4th Cir. 2000). Several courts have distinguished Price by holding that the *four-point restraint* does constitute excessive force when used on an individual who is suffering some significant "diminished capacity." See *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, 1186, 1188 (10th Cir. 2001) ("large amount of cocaine" in system); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 451 (5th Cir. 1998) ("drug-affected person in a

> state of excited delirium")."(emphasis added). *Tobias v. County of Putnam*, 191 F. Supp. 2d 364, 378 (S.D. N.Y., 2002).

The cause of "sudden death" of drug intoxicated persons during or just following a struggle with police, particularly when hogtied, but under various scenarios, remains the subject of nationwide debate in the courts and among forensic, medical, and law enforcement experts. The prevailing law in the Federal Circuits has been to either grant qualified immunity or find no constitutional violation, notwithstanding and in conflict with the current Ninth Circuit opinion in this matter, as illustrated by the following:

> "In light of the circumstances, defendant Tudor and Schreiber's efforts to control Alan by exerting some weight or pressure on his arms, legs and back did not constitute excessive force. See *Wagner v. Bay City, Texas*, 227 F.3d 316 (5th Cir. 2000) (use of pepper spray, taking person to the pavement, handcuffing him, placing knee to the back while restraining neck with a baton, as well as having two officers on top of him is not unreasonable in response to violent opposition to officers); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 593 (7th Cir. 1997), *cert. denied*, 522 U.S. 1116, 140 L. Ed. 2d 115, 118 S. Ct. 1052 (1998) (no excessive force found when officers placed suspect in prone position with arms and legs restrained and put knee in suspect's back for about a minute to control him where suspect actively resisted arrest); *Gassner v. City of Garland*, 864 F.2d 394, 400 (5th Cir. 1989) (choke hold, wrestling to the ground, and handcuffing in response to resistance to arrest for speeding and disorderly conduct is not excessive force);

Fernandez v. City of Cooper City, 207 F. Supp. 2d 1371, 1379-80 (S.D. Fla. 2002) (use of pepper spray, taking person down to ground, placing knee in back and putting cuffs on hands and legs is not excessive force against a schizophrenic person resisting arrest); *Tofano v. Reidel*, 61 F. Supp. 2d 289, 302 (D.N.J. 1999) (restraint in a prone position by three officers on top of an emotionally disturbed person who violently resisted arrest and handcuffing, is objectively reasonable); *Price v. County of San Diego*, 990 F. Supp. 1230, 1244 (S.D.Cal. 1998) (hogtie restraint, pressure to torso, knee to back, foot against head, and placing mentally unstable person prone on hot asphalt was reasonable force in response to resistance toward officers when asked to exit truck); cf., *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) (excessive force employed by officers who placed a mentally disturbed person on the ground, handcuffed him and, while he was prone on the ground, had two officers pressing their weight against his neck and torso even though he was pleading for air and was no longer resisting arrest). In all of the cases cited above except the Gassner case, the person being restrained by the officers' actions died.

"Even if the court determined that defendants Tudor and Schreiber's actions in this case could be found to be objectively unreasonable, Tudor and Schreiber are still entitled to qualified immunity because reasonable persons in their position could have believed that their conduct was lawful. See *Cruz v. City of Laramie*, 239 F.3d 1183, 1189-90 (10th Cir. 2001) (finding qualified immunity for officers who hog-tied an arrestee with diminished capacity because in 1996 there

> was not a clearly established right to be free from a hog-tie restraint under the circumstances); *Tobias v. County of Putnam*, 191 F. Supp. 2d 364 (S.D.N.Y. 2002) (qualified immunity for defendants who placed a four-point restraint on a person who was fighting officers to resist arrest in 1999); *Tofano*, 61 F. Supp. 2d at 304 (qualified immunity for restraining plaintiff in a prone position on the ground with three officers on top of plaintiff in 1995); *Guseman v. Martinez*, 1 F. Supp. 2d 1240, 1257-59 (D. Kan. 1998) (qualified immunity for officers who kept mentally disturbed obese person in a prone position in cuffs and leg restraints over an extended period of time in 1995). The measure of force and restraint used by Tudor and Schreiber was significantly less in this case than that used in the above-cited cases where qualified immunity was found." *Unzueta v. Steele*, 291 F. Supp. 2d 1230, 1238-1239 (D. Kan. 2003)

The Ninth Circuit's opinion transforms a disputed and controversial theory of "positional asphyxiation" into its own theory of "compression asphyxiation", adopts it as a fact and in effect, renders the defendant officers' application of otherwise minimal force as unconstitutionally excessive, "severe force likely to cause death", simultaneously pronouncing that theory as "clearly established law".

In developing its theory of "severe force" the Ninth Circuit's opinion commences with a recitation of cases in which the court *erroneously* states that "under similar circumstances, in what has come to be known as 'compression asphyxia', prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers" [App. 9], the Court of Appeal wrote:

"1. The Severe Nature of the Force Applied

We first assess the quantum of force used to arrest [the plaintiff] by considering 'the type and amount of force inflicted.' *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2002) (internal citations omitted). Although the officers in this case did not shoot or beat Drummond, *the force allegedly employed was severe and, under the circumstances, capable of causing death or serious injury*. Drummond claims that two officers continued to press their weight on his neck and torso as he lay handcuffed on the ground and begged for air. *Under similar circumstances, in what has come to be known as "compression asphyxia," prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining* officers. See, e.g., *Jones v. Ralls*, 187 F.3d 848, 850, 852 n.4 (8th Cir. 1999); *Bozeman v. Orum*, 199 F. Supp. 2d 1216, 1226 (M.D. Ala. 2002); *Tofano v. Reidel*, 61 F. Supp. 2d 289, 292-95 (D.N.J. 1999); *Alexander v. Beale St. Blues Co.*, 108 F. Supp. 2d 934, 939 (W.D. Tenn. 1999); *Johnson v. City of Cincinnati*, 39 F. Supp. 2d 1013, 1018 (S.D. Ohio 1999) . . . "

This is simply not the case at all. The cited cases are an inconsistent mix of different factual scenarios with which the court tries to bootstrap in its own theory of what it characterizes as "severe force" . . . "under circumstances capable of causing death" founded on a speculative theory on the dangers of "positional restraint asphyxiation", which even learned forensic experts in the medical community cannot agree upon. The court's citations are a collection of cases in which persons have died or become

comatose purportedly by asphyxiation, after police restraint or by "sudden death",[2] while in police custody, under varying factual circumstances and in which, *in most instances, the officers were granted qualified immunity* or no constitutional violation was found. For example, in *Jones v. Ralls, supra*, the court *affirmed* a *jury verdict for the defendant officers* under circumstances in which the decedent died *while under the influence of a combination of narcotics and alcohol level of .108.* While it is true that Drummond was intoxicated by alcohol and narcotics (cocaine), it is doubtful that the Ninth Circuit cited *Jones v. Ralls* for these factual similarities, as Drummond's admitted intoxication from alcohol and cocaine was omitted entirely from the Ninth Circuit's decision.

In *Bozeman v. Orum*, 199 F. Supp. 2d 1216, 1226 (M.D. Al., 2002), the court *granted summary judgment to the defendant officers*, holding that "the plaintiff has not produced sufficient evidence to create a jury question as to the excessive use of force, and, in any event, that the officers are entitled to qualified immunity for their use of force under the facts of this case where [the decedent] was carried out, face-down and covered by a sheet, by four officers, with an officer on each arm and on each leg, using batons passed through the shackles and handcuffs. None of the officers knew that this method of carrying [decedent] could cause him to asphyxiate; nor did they receive any training that suggested their actions could result in serious harm to [decedent]. Indeed, the officers had been trained to carry inmates using this method."

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[2] usually while intoxicated

In *Tofano v. Reidel*, 61 F. Supp. 2d 289, 302 (D.N.J. 1999) the plaintiff alleged "positional asphyxiation" by officers. The *court held that restraint in a prone position* by three officers on top of an emotionally disturbed person who violently resisted arrest and handcuffing, *was objectively reasonable*, despite evidence of petechial hemorrhages in conjunctivae of eyes (small pin point hemorrhages in inner lining of eyelids), contusion of [the] mucosa of lip (bruise of inner lining of lip due to compression against the teeth), abrasion of skin of neck (scratch due to pressure on the neck), [and] hemorrhages of internal structure of the neck[,] . . . noting that the coroner had also indicated that "death due to cocaine toxicity, per se cannot be fully excluded". *Tofano, supra*, at p. 295. Cocaine toxicity as a potential cause of injury/death, was omitted by the Ninth Circuit's analysis in *Drummond*, although it is notably a similar circumstance here. More significantly, however, in *Tofano v. Reidel, supra*, the evidence of classic symptoms of asphyxiation such as petechial hemorrhages and trauma to the mouth and neck are circumstances significantly different than those in *Drummond*, where no evidence of such trauma was found.

In *Alexander v. Beale St. Blues Co.*, 108 F. Supp. 2d 934, 939 (W.D. Tenn. 1999), "after cuffing [decedent], the officers and BB King's employees carried [decedent's] motionless body outside of the club and *placed him behind a police cruiser in a contorted position, placing [decedent] at grave risk of death by positional asphyxiation*". The "officers failed to provide [decedent] with timely medical treatment, and delayed in summoning medical personnel. [Decedent] was taken to the hospital by ambulance, where he later died as a result of traumatic asphyxia".

In *Johnson v. City of Cincinnati*, 39 F. Supp. 2d 1013, 1018 (S.D. Ohio 1999), "officers placed [decedent] face down on a stretcher with his legs tied and his hands cuffed behind his back" and "[decedent] suffered a 'cardiac dysrhythmia' due to 'agitated delirium with restraint', a type of sudden death caused by the combination of delirious mania and restraint".

Thus, even the cases cited by the Ninth Circuit to support its "severe force" theory illustrate the uncertainty of the law surrounding the controversial theory of "positional asphyxia". Requiring these police officers to have surmised as "clearly existing law" what the experts are unable to even agree upon now, over five years later, contradicts one of this court's most fundamental principles in reviewing police conduct in the context of the Fourth Amendment:

> "when the defendant moves for summary judgment based on qualified immunity, it is the plaintiff's burden to demonstrate that all reasonable officials similarly situated would have then known that the alleged defendants violated the United States Constitution", *Thompson v. Upshur County, Texas* (5th Cir. 2001) 245 F.3d 447, 460.
>
> "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized". *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).
>
> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of

> current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).
>
> "Given such an undeveloped state of the law, the officers in this case cannot have been "expected to predict the future course of constitutional law." * * * Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question. * * * If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 617-618 (1999).

The Ninth Circuit's opinion relies heavily on the fact that Drummond told the officers he couldn't breathe.[3] Assuming the officers heard this, it did not, *ipso facto*, render the officers' continued restraint of the plaintiff unlawful under clearly established law. Throughout the Federal Circuit courts, police officers have not been required to believe everything a suspect says, particularly when its an uncooperative suspect. For example, in *Hendon v. Ronald Reil*, 163 F. Supp. 2d 1316 (N.D. Ala. 2001)

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[3] The Ninth Circuit characterized this as "begging for air" however, this is an exaggeration by the court as there is no evidence whatsoever of "begging". In fact, witness, Kimbrough said that Drummond's statement he couldn't breathe was interspersed with profanity and threats to the officers so that witness, Kimbrough thought it was a "ploy", so they would let up and he could run away [App. 30].

the court held that officers were entitled to qualified immunity, notwithstanding the fact that the suspect, an elderly woman with heart problems told officers she was "suffocating," and suffered a mild heart attack as officers were attempting to take her into custody. The courts follow this precedent circuit wide:

> " . . . a police officer need not credit everything a suspect tells him. See *Marx v. Gumbinner*, 905 F.2d 1503, 1507 n.6 (11th Cir. 1990). This idea is especially true when the officer is in the process of handcuffing a suspect. As another federal court recently noted, statements by suspects claiming (at the time of their arrest) to have pre-existing injuries are, "no doubt, uttered by many suspects who, if given the choice, would prefer not to be handcuffed at all and, if they must be restrained in that manner, would prefer that the handcuffs be in front." *Caron v. Hester*, 2001 U.S. Dist. LEXIS 19382, 2001 WL 1568761, at 8 (2001) (granting officer, who handcuffed suspect behind suspect's back, qualified immunity on excessive force claim despite officer's alleged knowledge – based upon suspect's testimony that he told the officer – of suspect's pre-existing injury when "[the officer] was not confronted with any objective manifestation of [the suspect's] claimed shoulder problem"). In the context of this case – a case in which Sgt. Farrell, after midnight on the side of the road, reasonably believed that Plaintiff (who, as we discussed in our original opinion, had no obvious signs of injury specifically to his arm) was a fugitive who had evaded capture, Sgt. Farrell's alleged discounting of Plaintiff's arm-injury claim (a claim not made until after Sgt. Farrell began to arrest Plaintiff despite the fact that he had been in Sgt. Farrell's

> company for roughly 30 minutes when the handcuffing began) was reasonable. *Jackson v. City of Bremerton*, 268 F.3d 646, 652 (9th Cir. 2001) (in arrest for failing to disperse, pushing suspect to the ground and kneeling on her back not excessive force despite fact that suspect informed officer of her pre-existing back and shoulder injuries); *Morreale v. City of Cripple Creek*, 1997 U.S. App. LEXIS 12229, 1997 WL 290976, at 5-6 (1997) (in arrest for driving with a suspended license, milder handcuffing of suspect behind her back not excessive force despite suspect's request that she be handcuffed in front to avoid aggravating pre-existing shoulder injury). *Rodriguez v. Farrell*, 294 F.3d 1276, 1278 (11th Cir. 2002)

In the instant case, even if plaintiff did truthfully say to the officers that he couldn't breathe, clearly established law did not require them to stop restraining him, especially where all obvious manifestations (kicking the officers, cursing, loudly and forcefully enough for witnesses 10-30 feet away to hear him) contradicted these statements. The officers are not medical doctors and cannot be required to determine the intricacies that even the medical community cannot agree on. The officers' continued restraint of Drummond was not a violation of clearly established law. The Ninth Circuit's opinion in *Drummond* promulgates an unrealistic standard of conduct that defeats the intent and import of the Qualified Immunity in conflict with the precedent set forth by this court and followed throughout the Federal Circuit Courts.

The Ninth Circuit's Decision Uses a "Post Hoc" Analysis to Determine the Officers Violated Drummond's Fourth Amendment Rights in Derogation of *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 151 L. Ed. 2d 272 (2001) and *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and Contradicts Prevailing Federal Circuit Precedent

The Ninth Circuit's opinion that the officers used excessive force is founded on the speculation that plaintiff was suffocated. This speculation is based on the fact the plaintiff is now comatose and the opinion of plaintiff's expert based on a recently discredited and widely disputed theory of "positional asphyxiation". There is absolutely no objective evidence that plaintiff was suffocated. The emergency room physician found no evidence of injury to plaintiff's neck or torso or any classic evidence indicative of asphyxiation, such as that found in *Tofano v. Reidel*, *supra* (petechial hemorrhages and trauma to the mouth and neck). The officers continued to restrain plaintiff after he kicked them and he continued to yell at them, loudly enough for witnesses 10-30 feet away to hear, behavior that is ordinarily contraindicative of someone who is suffocating to death. Furthermore, they were not aware that he was under the influence of cocaine and alcohol at the time. In reaching its opinion, the Ninth Circuit used information that was not available to the officers at the time of the incident. This constitutes a post hoc analysis of police conduct in conflict with the long established precedent set by this court:

> "In Graham, we held that claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth

> Amendment's "objective reasonableness standard," not under substantive due process principles. 490 U.S. at 388, 394. *Because "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation," id., at 397, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. Id., at 396. We set out a test that cautioned against the "20/20 vision of hindsight" in favor of deference to the judgment of reasonable officers on the scene. Id., at 393, 396.* Graham sets forth a list of factors relevant to the merits of the constitutional excessive force claim, "requiring careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id., at 396. If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Saucier v. Katz*, 533 U.S. 194, 204-205 (2001) (emphasis added).

In *Johnson v. County of L.A.*, 340 F.3d 787, 790 (9th Cir. 2003) the court held an officer was entitled to summary judgment where he allegedly yanked, pulled, jerked and twisted plaintiff's body with a lot of force when extracting him from a crashed vehicle after pursuit, despite plaintiff's exclamation that he was stuck and officers were hurting him. The deputy believed that the plaintiff was trying to get him to back off so plaintiff could either retrieve a gun or attempt to escape and as he took

him from the car that he was dragging his feet as a form of passive resistance. It was later determined that plaintiff permanently had been rendered a paraplegic at some unknown point in the course of the crash and arrest. The Ninth Circuit panel of Judges Trott, Tallman, and Collins[4], noted:

> "Even though Johnson, as he alleges, was not actively resisting arrest at the time Deputy Woodard was pulling him from the car, the force applied to remove him was patently reasonable . . . the law does not hold Deputy Woodard accountable for information that only the '20/20 vision of hindsight' can provide" *Johnson v. County of L.A.*, 340 F.3d 787, 790-793 (9th Cir. 2003).

The undisputed evidence in this case reflects that the officers did not hit, kick or use any weapons, or pepper spray to subdue the plaintiff and there was no evidence of trauma to his neck, head or torso. Even accepting plaintiff's claim that they were restraining him with their full body weight, plaintiff continued to yell and curse at them and kick at least one officer away, precipitating the officer's use of an ankle restraint, whereupon plaintiff suddenly became docile. Such behavior is contraindicative of a person who is suffocating. Subjecting the officers to liability for suffocating this man based on these facts and a paid medical expert's opinion with no other objective signs of asphyxial trauma contradicts the most basic tenets of analysis of police conduct under the Fourth Amendment.

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[4] United States District Judge for the District of Arizona, sitting by designation

The Ninth Circuit's Reliance Exclusively on an Unsworn Conclusion to Dispute Facts Which Are Supported by Voluminous Sworn Testimony, Particularly a Fact Which Plaintiff Admitted, Is a Subversion of the Standards of Review on Summary Judgment Expressed in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587, 106 S. Ct. 1348 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

The overwhelming evidence that plaintiff was resisting, squirming and kicking and screaming and cussing, including his own admission that he kicked officer Sawyer just moments before he lost consciousness [App. 48, 50] renders the Panel's reliance on the solitary unsworn conclusion of Calleja for its cornerstone premise that plaintiff was not resisting *implausible*.

> "If the factual context makes the non-moving party's claim of a disputed fact implausible, then that party must come forward with more persuasive evidence than otherwise would be necessary to show that there is a genuine issue for trial." *Blue Ridge Insurance Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998)

> "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.* (Emphasis added.) *Matsushita Electric Industrial Co., Ltd. v. Zenith*

Radio Corp., 475 U.S. 574, 586-587, 106 S. Ct. 1348 (1986).

The Ninth Circuit rested the gravamen of its opinion that the defendant officers used excessive force on the plaintiff's claim he was "not resisting" the officers when they continued to "place their weight" on his back and neck to subdue him [App. 11-13]. The sole "evidentiary" support for plaintiff's claim he was not resisting was an investigator's (unsworn) report[5] containing the summary of a telephone interview including an *unsworn conclusion* by Victor Calleja that plaintiff "was not resisting". *Significantly*, Calleja's only sworn statement filed with plaintiff's opposition to summary judgment is not cited to controvert (defendants undisputed) facts # 7, 9, 11, 12, 13, 15, 18, 21 and 25 which document in detail the nature and extent of plaintiff's struggle in resistance to the officers. This is because *his only sworn statement is devoid of such facts.* [App. 41-50].

In support of their motion for summary judgment defendants submitted the deposition of testimony of the four defendant officers as well as the sworn deposition testimony of eyewitness and reporting party, David Kimbrough, the deposition testimony of plaintiff's girlfriend, Olivia Graves, and the sworn statement of emergency room physician, Dr. David Reid and his corresponding hospital emergency room records. This voluminous evidence established the details of plaintiff's combativeness and resistance to the officers, the minimal force used by officers and

[5] Defendants objected to this as hearsay [App. 51, 55], contrary to what is stated in the Ninth Circuit's opinion [App. 11].

the lack of any evidence of trauma to plaintiff's neck, head or torso thus ruling out the "positional asphyxiation" that was alleged by the plaintiff.

The solitary unsworn statement of Calleja is a "scintilla" of evidence and insufficient to make the necessary showing that there is a genuine issue for trial regarding whether plaintiff was resisting the officers at the time of the incident. *This is particularly true because the plaintiff expressly admitted defendants undisputed facts #21 and 25, that he kicked officer Sawyer away just moments before Sawyer applied the ankle restraint.*

> "If the evidence is merely colorable, [citations omitted] summary judgment may be granted . . . .
>
> ". . . Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-251 (1986).

In *LaLonde v. County of Riverside*, 204 F.3d 947, 962 (9th Cir. 2000) a similar issue was addressed in the dissent by Judge Trott at p. 962-964:

> "I respectfully disagree with the majority's conclusion that the "knee-in-the-back" allegation was sufficient to survive a claim of qualified immunity. There is no doubt from this record, none whatsoever, that LaLonde was resisting arrest when this force was applied. *He admits this unlawful behavior. A person being detained or arrested has no right to resist*, even if the detention or arrest is without reasonable suspicion or probable cause. (Emphasis added) *Ibid.*

The Ninth Circuit's decision on these facts is a subversion of this court's longstanding precedent on review of summary judgment and undermines the stated goal of qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Jeffers v. Gomez*, 267 F.3d 895, 909-910 (9th Cir. 2001).

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Honorable Court to grant this Petition for Writ of Certiorari.

Dated March 8, 2004

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
CITY OF ANAHEIM
DEBORAH LYNNE PERNICE KNEFEL
Deputy City Attorney

Counsel for Petitioners

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN THOMAS DRUMMOND, by and through his Guardian ad Litem Thomas R. Drummond,

Plaintiff-Appellant,

v.

CITY OF ANAHEIM, a California municipal entity; ANAHEIM POLICE DEPARTMENT, a California municipal entity; ROGER BAKER; CHRISTOPHER NED; KRISTI VALENTINE; BRIAN MCELHANEY; GREGORY SAWYER

Defendants-Appellees.

No. 02-55320
D.C. No.
CV-00-00243-AHS

OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
February 3, 2003 – Pasadena, California

Filed September 10, 2003

Before: James R. Browning, Harry Pregerson, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

Federico C. Sayre and Kent M. Henderson, Law Offices of Federico C. Sayre, Santa Ana, California, for the plaintiff-appellant.

Deborah P. Knefel, Deputy City Attorney, Anaheim, California, and William F. Bernard, Orange, California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

We again confront the interplay of excessive force and qualified immunity in a case in which a mentally disturbed individual suffers serious injuries as a result of an encounter with police officers. Once again, we reverse the grant of summary judgment in favor of the officers and remand for a trial on the merits. Three Anaheim police officers determined that Brian Drummond, who was unarmed and mentally ill, should be taken to a medical facility for his own safety, but the manner in which they attempted to subdue and restrain him resulted in his falling into a coma from which he has never recovered. Drummond brought suit under 42 U.S.C. § 1983, alleging that the officers used excessive force, in violation of the Fourth Amendment. We hold that, under the circumstances, it would have been clear to a reasonable officer at the time of the encounter that the force alleged was constitutionally excessive. We therefore reverse the district court's grant of summary judgment in favor of the defendants and remand for further proceedings.

I. BACKGROUND[1]

On March 25, 1999, Brian Drummond's fiancee Olivia Graves called the Anaheim police. Drummond, who had a history of mental illness (bipolar disorder and schizophrenia), had run out of medication and was hallucinating and paranoid. Graves asked the police to help her take Drummond to the hospital to receive medical assistance.

Four Anaheim police officers responded to Graves's call; among them were Kristi Valentine, a rookie, and Christopher Ned, her training officer. The officers determined that Drummond was not a danger to himself or others – the criteria for an involuntary psychiatric detention under CAL. WELF. & INST. CODE § 5150. The officers therefore refused to take him into custody, for transport or otherwise. Graves alleges that the officers were "not very professional," and were "joking around" throughout the encounter. Later, Drummond voluntarily accompanied Graves to a medical facility to obtain the lithium that had been prescribed for him, but he had neither medical insurance nor enough money with him to obtain the drugs and left without them.

The next night, the Anaheim police were again called to help protect Drummond; his neighbor, David Kimbrough, called the police because he was afraid that Drummond was going to hurt himself by darting into traffic. Officers Ned, Valentine, and Brian McElhaney,

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[1] Because we review a grant of summary judgment, we view the evidence in the light most favorable to Drummond, the nonmoving party, and accept the version of all disputed facts most favorable to him. See *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir. 1999); *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000).

responding to the call, found Drummond in a 7-Eleven parking lot; Ned and Valentine recognized him as the subject of the call from the night before. Drummond, who was unarmed, was hallucinating and in an agitated state, and the officers called for an ambulance to transport him to a medical facility, pursuant to § 5150. Before the ambulance arrived, however, the three officers decided to take him into custody, "for his own safety."

Independent eyewitnesses saw Officer Ned "knock Drummond to the ground[,] where the officers cuffed his arms behind his back as Mr. Drummond lay on his stomach." Although Drummond offered no resistance, McElhaney "put his knees into Mr. Drummond's back and placed the weight of his body on him. [Ned] also put his knees and placed the weight of his body on him, except that he had one knee on Mr. Drummond's neck."

Drummond weighed only 160 pounds at the time of the incident; although there is no indication of McElhaney's weight in the record, Ned weighed approximately 225 pounds at the time. With the two officers leaning on his neck and upper torso, Drummond soon fell into respiratory distress. Two eyewitnesses verified that "Mr. Drummond repeatedly told the officers that he could not breathe and that they were choking him. He also told them that he was thirsty and needed a glass of water. The officers however continued to put their weight upon Mr. Drummond[']s back and neck." One of these eyewitnesses, Victor Calleja, stated that although McElhaney and Ned were "obviously causing [Drummond] to have trouble breathing," "[t]he officers were laughing during the course of these events."

Approximately twenty minutes after Drummond was taken down, Officer Gregory Sawyer arrived at the parking lot. The officers then obtained a "hobble restraint," which they used to bind Drummond's ankles.[2] One minute after the restraint was applied, Drummond went limp, and the officers realized that he had lost consciousness. They checked his pulse, and then removed the handcuffs and hobble restraint and turned him over, onto his back. The officers attempted to perform CPR on Drummond until the paramedics finally arrived.

Although Drummond was revived approximately seven minutes after losing consciousness, he sustained brain damage and fell into a coma. He is now in a "permanent vegetative state."

Drummond's medical expert, Dr. Sunil Arora, is the Medical Director of the Neurological Care Unit at the Community Hospital of San Bernadino [sic], and one of Drummond's treating physicians. Arora submitted a declaration stating that, to a reasonable medical probability, Drummond "suffered a cardiopulmonary arrest caused by lack of oxygen to his heart. The lack of oxygen . . . was caused by his inability to breathe caused by mechanical compression of his chest wall such that he could not inhale and exhale in a normal manner. [Arora believes] that this occurred when [Drummond] was face[-]down on the ground and the police officers set upon his back preventing the anterior wall of his chest from expanding."

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[2] The record does not disclose whether the three officers initially responding to the call had the hobble restraint in their cruisers, or whether Sawyer brought it with him.

Drummond filed a complaint in the district court. The complaint named as defendants the city of Anaheim, the Anaheim police department and its police chief, and the individual officers who responded to the March 26 call; it alleged federal claims for violations of §§ 1981 and 1983, and state claims for assault and battery, negligent use of force, negligent hiring and training, and intentional infliction of emotional distress. The defendants moved for summary judgment, which the district court granted, finding both that there was no constitutional violation by any defendant, and that even if there were a violation, the law was not sufficiently clearly established that a reasonable officer would have known the conduct to be unconstitutional. As a result, the court held that all defendants were entitled to qualified immunity as a matter of law. The court also granted summary judgment in favor of the defendants as to Drummond's state claims, holding that each such claim depended on the showing of a constitutional violation. Drummond timely appealed.

II. DISCUSSION

Drummond contends that the district court erred in finding qualified immunity on behalf of the city and its police officers.[3] Specifically, Drummond contends that his allegations present a genuine issue of material fact as to whether the officers' conduct violated the Constitution,

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[3] Of course, a city may not assert a defense of qualified immunity; only individual defendants may do so. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Huskey v. City of San Jose*, 204 F.3d 893, 902 (9th Cir. 2000). Because we reverse as to the city on other grounds, we simply note this fact for the benefit of all concerned.

and that any reasonable officer would have understood the alleged conduct to constitute such a violation.

Due in part to the volume of excessive force cases in this circuit, the legal framework for evaluating such cases is, by now, straightforward.

> In order to decide whether state officers are entitled to qualified immunity, *Saucier* [*v. Katz,* 533 U.S. 194 (2001),] instructs that we must first determine whether, "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show [that] the officer's conduct violated a constitutional right." *Saucier,* [533 U.S. at 201]. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125, 1129 (9th Cir. 2002) [*Headwaters II*]; *see also Robinson v. Solano County,* 278 F.3d 1007, 1012-13 (9th Cir. 2002) (en banc) (same).

A. The Alleged Conduct Violated the Constitution

Following *Saucier,* we first determine whether, on the facts offered in support of Drummond's claim, the Anaheim officers' conduct violated the constitutional prohibition against the use of excessive force. As we have explained:

> A Fourth Amendment claim of excessive force is analyzed under the framework set forth by the

> Supreme Court in *Graham v. Connor,* [490 U.S. 386 (1989)]. That analysis requires balancing the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the use of force was objectively reasonable under the circumstances. [*Id.* at 396.] Determining whether a police officer's use of force was reasonable or excessive therefore "requires careful attention to the facts and circumstances of each particular case" and a "careful balancing" of an individual's liberty with the government's interest in the application of force. *Id.*; *see Deorle v. Rutherford,* 272 F.3d 1272, 1279-81 (9th Cir. 2001). Because such balancing nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly. *See, e.g., Liston v. County of Riverside,* 120 F.3d 965, 976 n.10 [(9th Cir. 1997)] (citing several cases). This is because police misconduct cases almost always turn on a jury's credibility determinations. This case is no different.

Santos v. Gates, 287 F.3d 846, 853 (9th Cir. 2002).

1. The Severe Nature of the Force Applied

"We first assess the quantum of force used to arrest [the plaintiff] by considering 'the type and amount of force inflicted.'" *Deorle,* 272 F.3d at 1279 (internal citations omitted). Although the officers in this case did not shoot or beat Drummond, the force allegedly employed was severe and, under the circumstances, capable of causing death or

serious injury. Drummond claims that two officers continued to press their weight on his neck and torso as he lay handcuffed on the ground and begged for air. Under similar circumstances, in what has come to be known as "compression asphyxia," prone and handcuffed individuals in an agitated state have suffocated under the weight of restraining officers. *See, e.g., Jones v. Ralls,* 187 F.3d 848, 850, 852 n.4 (8th Cir. 1999); *Bozeman v. Orum,* 199 F. Supp. 2d 1216, 1226 (M.D. Ala. 2002); *Tofano v. Reidel,* 61 F. Supp. 2d 289, 292-95 (D.N.J. 1999); *Alexander v. Beale St. Blues Co.,* 108 F. Supp. 2d 934, 939 (W.D. Tenn. 1999); *Johnson v. City of Cincinnati,* 39 F. Supp. 2d 1013, 1018 (S.D. Ohio 1999); *see also* cases cited *infra* at 1332.[4]

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[4] Despite the deadly history of this type of force, it is not clear whether the force allegedly applied in this case constitutes "deadly force" under *Tennessee v. Garner,* 471 U.S. 1 (1985), to be used *only* if "it is necessary to prevent the escape [of a suspected felon] and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Brewer v. City of Napa,* 210 F.3d 1093, 1097-98 (9th Cir. 2000) (quoting *Garner,* 471 U.S. at 3) (internal quotation marks and emphasis omitted); *see also Monroe v. City of Phoenix,* 248 F.3d 851, 859 (9th Cir. 2001) (noting the twin requirements of escape and serious physical harm).

"In this circuit, under *Garner,* 'deadly force is that force which is reasonably likely to cause death.'" *Monroe,* 248 F.3d at 859 (quoting *Vera Cruz v. City of Escondido,* 139 F.3d 659, 663 (9th Cir. 1998)). *Vera Cruz* recognized that not merely the quantum of force, but also how that force is applied, may render it more or less likely to cause death. *See Vera Cruz,* 139 F.3d at 663 n.4; *cf. Robinette v. Barnes,* 854 F.2d 909, 913 (6th Cir. 1988) ("As we already have stated, the totality of the factors present in a particular case determine whether deadly force was used to apprehend a suspect."). Here, although the force employed by the Anaheim police is not extreme in the abstract, it may be reasonably likely to cause death when applied under certain circumstances. Because we find a genuine issue of material fact as to whether the force used was constitutionally excessive under the ordinary *Graham*

(Continued on following page)

2. The Minimal Need for the Force

"[F]orce, [even if] less than deadly, is not to be deployed lightly. To put it in terms of the test we apply: the degree of force used by [the police] is permissible only when a strong government interest *compels* the employment of such force." *Deorle,* 272 F.3d at 1280 (emphasis added). *See also Headwaters II,* 276 F.3d at 1130 ("'[T]he essence of the *Graham* objective reasonableness analysis' is that' [t]he force which [i]s applied must be balanced against the *need* for that force: it is the need for force which is at the heart of the *Graham* factors.'") (quoting *Liston v. County of Riverside,* 120 F.3d 965, 976 (9th Cir. 1997)).

In *Graham,* the Supreme Court specified that the government interest in safely effecting an arrest must be "examined in light of the 'severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Santos,* 287 F.3d at 854 (quoting *Graham,* 490 U.S. at 396). In this case, we recognize that some degree of physical restraint may have been necessary to prevent Drummond from injuring himself. The facts as we must accept them, however, reflect no justification for the degree of force used here.

Applying the *Graham* factors to the physical restraint of Drummond, we note first that *no* underlying crime was "at issue" – the police had become involved solely because

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balance, we need not decide on this appeal whether it would constitute "deadly force" under *Garner.*

a neighbor was worried that Drummond was acting in an emotionally disturbed manner and might injure himself. Second, while Drummond may have represented a threat (to himself or possibly others) before he was handcuffed – an action that he does not claim was in itself an excessive use of force – after he was "knock[ed] . . . to the ground where the officers cuffed his arms behind his back as [he] lay on his stomach," a jury could reasonably find that he posed only a minimal threat to anyone's safety. Finally, evidence in the record derived from an independent eyewitness unequivocally states that once Drummond was on the ground, he "was not resisting the officers"; there was therefore little or no need to use any further physical force.[5] All three Graham factors would have permitted the use of only minimal force once Drummond was handcuffed and lying on the ground.

Furthermore, we have held that a detainee's mental illness must be reflected in any assessment of the government's interest in the use of force:

> The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance

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[5] Although this evidence – the summary of an interview conducted by a district attorney's investigator – may have been inadmissible hearsay, the defendants did not object below and have therefore, for purposes of this appeal, waived any objection. *See, e.g., Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002) ("In order to preserve a hearsay objection, a party must either move to strike the affidavit or otherwise lodge an objection with the district court."); *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 n.5 (9th Cir. 2002) ("[Plaintiff] did not object to and has thus waived any challenge to the district court's evidentiary rulings with respect to the evidence submitted by [the defendant].").

> or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis. . . . Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham,* the reasonableness of the force employed.

Deorle, 272 F.3d at 1282-83.

3. Balancing the Severe Force Against the Minimal Need

Ultimately, our duty to balance the officers' substantial application of force against the government's less-than-overwhelming interest in that force amounts to

determining whether the force employed was "greater than is reasonable under the circumstances." *Santos,* 287 F.3d at 854. This determination "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 396-97. Nevertheless, "it is equally true that even where some force is justified, the amount actually used may be excessive." *Santos,* 287 F.3d at 853.

Here, some force was surely justified in restraining Drummond so that he could not injure either himself or the arresting officers. However, after he was handcuffed and lying on the ground, the force that the officers then applied was clearly constitutionally excessive when compared to the minimal amount that was warranted. Drummond was a mentally disturbed individual not wanted for any crime, who was being taken into custody to prevent injury to himself. Directly causing him grievous injury does not serve that objective in any respect. Once on the ground, prone and handcuffed, Drummond did not resist the arresting officers. Nevertheless, two officers, at least one of whom was substantially larger than he was, pressed their weight against his torso and neck, crushing him against the ground. They did not remove this pressure despite Drummond's pleas for air, which should have alerted the officers to his serious respiratory distress. Moreover, according to independent eyewitnesses, other officers "stood around and laughed" while Drummond was restrained; although the officers' "underlying intent or

motivation" is irrelevant to the excessive force inquiry, *Graham,* 490 U.S. at 397, the officers' apparent lack of concern does indicate that Drummond was not sufficiently dangerous to others to warrant the use of the severe force applied.

The officers – indeed, any reasonable person – should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable. In this case, it is even more striking that the officers had been specifically warned of the extreme danger of this sort of force. Not only was there ample publicity in Southern California regarding similar instances of asphyxiation as a result of the use of similar force in the months before the incident, *see $650,000 Settlement OKd in Inmate Death,* L.A. TIMES, Feb. 24, 1999, at B4; *Supervisors Asked to OK $2.5 Million to Settle Suits,* L.A. TIMES, Feb. 2, 1999, at B1; but, more important, the Anaheim police department had issued a training bulletin in April of 1998 *specifically* warning officers that "when one or more [officers] are kneeling on a subject's back or neck to restrain him, compression asphyxia can result ['t]hat may be a precipitating factor in causing death.'" Anaheim Training Bulletin #98-14 (Apr. 1998). Although such training materials are not dispositive, we may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable. As the Fifth Circuit stated, "it may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department or of whose dangers in these circumstances they had been warned." *Gutierrez v. City of San Antonio,* 139 F.3d 441, 449 (5th Cir. 1998). *See also Scott v. Henrich,* 39 F.3d 912,

916 (9th Cir. 1994) ("Thus, if a police department limits the use of chokeholds to protect suspects from being fatally injured, . . . such regulations are germane to the reasonableness inquiry in an excessive force claim.") (internal citations omitted).[6] Viewing the facts in the light most favorable to Drummond, and resolving all disputed facts in his favor, we hold that under the circumstances, the officers' use of severe force was constitutionally excessive.

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[6] Drummond also presented the declaration of David Dusenbury, the former Deputy Chief of the Long Beach Police Department, who has thirty years of experience as a police officer. Because Dusenbury's declaration is not necessary to establish a substantial question of material fact as to whether the officers' conduct was excessive under the circumstances, we need not decide whether Dusenbury would qualify as an expert witness at trial. Nevertheless, we note that after considering a comprehensive set of materials, Dusenbury concluded that:

> reasonable police officers could not believe that they were acting appropriately [for reasons which include] the facts that there were which include] the facts that there were numerous and egregious violations of standard police practice, violations of a number of Anaheim's own policies and procedures, the numerous protestations of Mr. Drummond witnessed by at least two independent witnesses that he was unable to breathe, the fact that he was not being stopped for a serious crime but because of his mental disturbance, the fact that after he was cuffed he presented little objectively reasonable threat of flight or to the safety of the officers, and the cavalier, perhaps malicious, attitude of the officers reflected by the fact that, if true, they were laughing a[t] Drummond during the incident. Further, . . . Anaheim's Police Department had [a] longstanding policy for many years before the incident which warned of putting arrestees in Drummond's state at risk of respiratory failure.

B. The Constitutional Violation Was Clearly Established

Because we hold that Drummond's factual allegations, if true, establish a constitutional violation, we must proceed to the second step in the qualified immunity analysis: whether the law was clearly established such that a reasonable officer would have known that the conduct alleged was unlawful. The Supreme Court has stated that officers are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). There is no question that Drummond's basic constitutional right to be free from excessive force was clearly established as of 1999, but our inquiry is more specific than that. The defendants argue that the officers should not be held liable because reasonable officers would not have understood that they were violating the constitution by subduing Drummond with the degree of force they employed. *Saucier* allowed for the possibility that an officer might misunderstand the amount of force permissible under particular factual circumstances, and held that "[i]f the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense." *Saucier,* 533 U.S. at 205. Accordingly, we now decide "whether it would [have been] clear to a reasonable officer [in 1999] that his conduct was unlawful in the situation he confronted." *Id.* at 202; *see also Robinson,* 278 F.3d at 1015. We hold that, under the circumstances, a reasonable officer would have had fair notice that the force employed was unlawful, and that any mistake to the contrary would have been unreasonable.

"'[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, 'including decisions of state courts, other circuits, and district courts.'" *Malik v. Brown,* 71 F.3d 724, 727 (9th Cir. 1995) (internal citations and quotation marks omitted). Even "unpublished decisions of district courts may inform our qualified immunity analysis." *Sorrels v. McKee,* 290 F.3d 965, 971 (9th Cir. 2002).[7] However, it is

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[7] The defendants rely primarily on two cases to show that it would not have been clear to the Anaheim officers that their conduct was constitutionally unreasonable. In *Estate of Phillips v. City of Milwaukee,* 123 F.3d 586 (7th Cir. 1997), the Seventh Circuit found that police used reasonable force in restraining an obese, deranged, struggling man in a prone position using handcuffs, leg shackles, and with one female officer's knee "gently sitting" on the arrestee's right shoulder for between thirty seconds and one minute. *Id.* at 589, 592-94. Four months later, in *Price v. County of San Diego,* 990 F. Supp. 1230 (S.D. Cal. 1998), a district judge held after a bench trial crediting most of the police evidence that "incidental pressure applied to [the prone, bound, struggling, methamphetamine-delirious suspect's] torso" "for a few seconds," *id.* at 1239-40, did not "on the particular facts of this case . . . constitute excessive force." *Id.* at 1240 n.17.

Neither *Phillips* nor *Price* affects our conclusion that the Anaheim officers had "fair warning" that the force employed in this case was constitutionally excessive. The pressure allegedly applied here – two officers leaning their weight on Drummond's neck and torso for a substantial period of time – was far greater than that applied in either case above. *See Phillips,* 123 F.3d at 589 (one knee "gently sitting" on the detainee's shoulder for less than one minute); *Price,* 990 F. Supp. at 1239-40 ("incidental pressure" on the detainee's torso "for a few seconds"). Moreover, there was far less need for such pressure in the case at hand. In both *Phillips* and *Price,* the suspects were struggling violently as the police attempted to restrain them, but according to an independent eyewitness, once Drummond was on the ground, he "was not resisting the officers." Furthermore, in neither of the above cases did the court find that the police were actually put on notice of the detainee's respiratory distress. Here, Drummond offers evidence that he

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not necessary that the alleged acts have been previously held unconstitutional, as long as the unlawfulness was apparent in light of existing law. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987); *see also Deorle,* 272 F.3d at 1285-86 ("Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle [the defendant] to qualified immunity: notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct.") (internal citation omitted). As the Supreme Court recently reiterated:

> [O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. . . . [T]he salient question that the Court of Appeals ought to have asked is whether the state of the law [at the time of the alleged wrong] gave respondents fair warning that their alleged treatment of [the petitioner] was unconstitutional.

Hope v. Pelzer, 536 U.S. 730, 741 (2002). *See also United States v. Lanier,* 520 U.S. 259, 271 (1997) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,' *Anderson,* [483 U.S.

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repeatedly told the officers that he could not breathe – indeed, that he begged for air.

at 640.] . . . 'The easiest cases don't even arise.'") (internal citation omitted).

Viewing the evidence in the light most favorable to Drummond, we conclude that the officers had "fair warning" that the force they used was constitutionally excessive even absent a Ninth Circuit case presenting the same set of facts. The officers allegedly crushed Drummond against the ground by pressing their weight on his neck and torso, and continuing to do so despite his repeated cries for air, and despite the fact that his hands were cuffed behind his back and he was offering no resistance. *Any* reasonable officer should have known that such conduct constituted the use of excessive force. Moreover, not only did local newspaper publicity less than two months before the incident publicize cases of compression asphyxia, *see supra* at 13316, and not only did prior federal cases describe the dangers of pressure on a prone, bound, and agitated detainee, *see Swans v. City of Lansing,* 65 F. Supp. 2d 625, 633-34 (W.D. Mich. 1998); *Estate of Bryant v. Buchanan,* 883 F. Supp. 1222, 1224 (S.D. Ind. 1995); but the officers received training from their *own police department* explaining specifically that "when one or more [officers] are kneeling on a subject's back or neck to restrain him, compression asphyxia can result ['t]hat may be a precipitating factor in causing death.'" Anaheim's training materials are relevant not only to whether the force employed in this case was objectively unreasonable, *see supra* section I.A.3, but also to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable.

The force allegedly employed by the officers was certainly not warranted, and reasonable officers would clearly have known that it was not. We need no federal

case directly on point to establish that kneeling on the back and neck of a compliant detainee, and pressing the weight of two officers' bodies on him even after he complained that he was choking and in need of air violates clearly established law, and that reasonable officers would have been aware that such was the case. *Cf. LaLonde,* 204 F.3d at 961 ("[I]n a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of [force] or a refusal without cause to alleviate its harmful effects constitutes excessive force."). We hold, on the record before us, that the officers violated Drummond's constitutional rights and that, because the law was clearly established, any reasonable officer would have known that the force used amounted to a constitutional violation. We therefore reverse the district court's grant of summary judgment in favor of the individual officers and remand for trial.

C. Drummond's Other Claims

In addition to the excessive force claims against the individual officers, Drummond alleged claims under 42 U.S.C. § 1983 against the city of Anaheim and its police department, and several state law claims against both the city and the individual officers. The district court held that a finding of excessive force was necessary, if not sufficient, to permit recovery on each of these claims. Because it determined that the force at issue here was not excessive, it granted summary judgment on Drummond's remaining claims in favor of the defendants. *See Robinson v. Solano County,* 278 F.3d 1007, 1016 (9th Cir. 2002) (agreeing that similar claims depend on a finding of excessive force).

As we hold, *supra*, the district court erred in its predicate judgment that the facts alleged do not support a finding of a constitutional violation; it therefore erred in granting summary judgment against Drummond on his remaining claims. Because none of the parties has briefed on appeal any issue involving the remaining claims, we decline to exercise our discretion to determine whether we would affirm the district court on other grounds with respect to any of them. *See Coszalter v. City of Salem,* 320 F.3d 968, 979 (9th Cir. 2003). Instead, we vacate the judgment in its entirety and remand to allow the district court the opportunity to address the remaining claims in light of our determination that the facts alleged constitute a constitutional violation.[8]

III. CONCLUSION

Police officers were called to take a mentally ill individual into custody for his own safety, but within a half-hour, they had caused him to fall into a coma that has left him in a vegetative state. Drummond was knocked to the ground and handcuffed; despite the fact that he offered no resistance, the officers then allegedly pressed their weight onto his neck and torso, and maintained that pressure for a significant period of time, ignoring his pleas for air. The compression asphyxia that resulted appears

[8] We note that given the issue of Monell liability and Drummond's negligent hiring and training claims, the defenses of the individual officers and the municipal entities present the possibility for a conflict of interest if these parties continue to be represented by the same counsel. We leave the appropriate resolution of these claims to the district court on remand.

with unfortunate frequency in the reported decisions of the federal courts, and presumably occurs with even greater frequency on the street. Indeed, the Anaheim Police Department was sufficiently concerned about compression asphyxia that in a training bulletin, it specifically warned its officers of the danger of kneeling on a detainee's neck or back almost one year before the incident that sent Drummond into a coma.

Under the circumstances, we hold that the force allegedly employed was, if proven, constitutionally excessive. The force was not only severe, but it was also, on the facts asserted, wholly unwarranted. We further conclude that any reasonable officer would have understood such force to be constitutionally excessive. We therefore reverse the court's grant of summary judgment in favor of the individual officers on the § 1983 claims and remand for further proceedings. Because the district court's grant of summary judgment on Drummond's remaining claims was predicated entirely on its erroneous conclusion regarding the excessive force issue, we vacate the remainder of the district court's judgment and remand those claims as well for further proceedings consistent with this opinion.

REVERSED in part, VACATED in part, AND REMANDED.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN DRUMMOND, by and through his guardian ad litem, THOMAS DRUMMOND, Plaintiff, vs. CITY OF ANAHEIM, et al., Defendants.	Case No. SACV00-243-AHS (ANx) JUDGMENT

(Filed Jan. 17, 2002)

This action came on for hearing before this Court on January 14, 2002, Hon. Alicemarie H. Stotler, District Judge, Presiding on a Motion for Summary Judgment, and the evidence presented having been fully considered, the issues having been heard and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED THAT the plaintiff take nothing, that the action be dismissed on the merits and that defendants, CITY OF ANAHEIM,

ROGER BAKER, KRISTI VALENTINE, BRIAN MCELHANEY, GREGORY SAWYER and CHRISTOPHER NED may recover their costs.

DATED: January 15, 2002

/s/ Alicemarie H. Stotler
HONORABLE
ALICEMARIE H. STOTLER
United States District Judge

IT IS HEREBY ORDERED THAT motion of defendants CITY OF ANAHEIM, ROGER BAKER, KRISTI VALENTINE, BRIAN MCELHANEY, GREGORY SAWYER and CHRISTOPHER NED for summary judgment is granted.

DATED: January 15, 2002

/s/ Alicemarie H. Stotler
HONORABLE
ALICEMARIE H. STOTLER
United States District Judge

PROOF OF SERVICE
1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 200 S. Anaheim Boulevard, Suite 356, Anaheim, California 92805.

On, December 3, 2001, I served the foregoing document described as Order on Defendants' City of Anaheim's Motion for Summary Judgment on interested

parties in this action by placing the true copies there of enclosed in sealed envelopes addressed to as stated as follows or on the attached mailing list:

Marc A. Karlin Karlin & Karlin 3701 Wilshire Blvd. Ste. 1035 Los Angeles, CA 90010-2804	Kent M. Henderson, Esq. Law Offices of Frederico Sayre 450 Newport Center Drive, #650 Newport Beach, CA 92660-7610
Norman Watkins, Esq. Lynberg & Watkins 333 City Blvd. West, #640 Orange, CA 92868	

(**X**) BY MAIL: As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Anaheim, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

( ) BY FACSIMILE: I caused the contents of said envelope to be delivered by Facsimile machine to the number indicated after the address (e's) noted.

( ) BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the address (e's) noted.

(**X**) (Federal) I declare that I employed in the office of a member of the bar of this court at whose direction the service was made.

( ) (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 3, 2001, at Anaheim, California.

/s/ Mary L. Coates
MARY L. COATES

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN THOMAS DRUMMOND, by and through his guardian ad litem, THOMAS R. DRUMMOND, Plaintiff, vs. CITY OF ANAHEIM, et al. Defendants.	CASE NO: SACV00-243 AHS (ANx) STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT* DATE: January 14, 2002 TIME: 10:00 a.m. COURTROOM: 10A HONORABLE ALICEMARIE STOTLER

(Filed Jan. 17, 2002)

* Bracketed corrections made by Judge Alicemarie H. Stotler.

After consideration of the papers in support of and in opposition to defendants' motion for summary judgment and the oral argument of counsel, the Court determines that the following facts have been established as,

UNCONTROVERTED FACTS

1. On March 26, 1999, [defendant] Anaheim [P]olice [Department ("Anaheim Police")] were contacted by [Plaintiff Brian] Drummond's [("Drummond")] neighbor Kimbrough and Creath with a report that Drummond posed a threat to the residents and to himself. (Kimbrough deposition, 24:9-25; 26:2-6)

2. When police responded, they recognized Drummond as the same subject of a call from Drummond's girlfriend [[Olivia] Graves ("Graves")] on March 25th wherein she had requested police take him into custody as a [Welfare and Institutions Code] § 5150 (danger to himself and others). (Ned deposition, 44:10-15; Graves deposition, 19:20-20:24; Valentine deposition, 34:6-35:3)

3. When police located him on a busy Anaheim street shortly before 10:00 p.m., [defendants Christopher Ned ("Ned") and Kristi Valentine ("Valentine")] noted that Drummond was hallucinating, sweating and incoherent. (Net deposition, 45:5-9; Valentine deposition, 34:6-35:3; Exhibit C, Call History)

4. When police attempted to speak with him, he appeared to be moving toward the busy Magnolia Street. (Valentine deposition, 44:18-45:5)

5. When they contacted [Graves] to enlist her aid in calming Drummond, she refused to speak with Drummond. (Graves deposition, 33:24-35:19)

6. With no other options apparent to them, [police officer] on the scene therefore made a decision to take him into custody for his own safety for transportation to a local health care facility under W.I. § 5150 evaluation. (Ned deposition, 52:1-16)

7. In his agitated and hallucinative state, Drummond resisted but police succeeded in placing handcuffs on him and requested an ambulance. (Ned deposition, 53:1-23; McElhaney deposition, 25:20-26:13; Exhibit C, Call History)

8. [Defendant city of] Anaheim'[("Anaheim")]s practice was to arrange for the transportation of violent subjects such as Drummond to a medical facility by ambulance, strapped to a gurney. (Rodig deposition, 65:24-66:4, 93:17-96:20)

9. Drummond continued to resist and fight with police as they attempted to seat him in a patrol car to await the ambulance. They [were not able to place Drummond in a patrol car due to his] violent resistance. (Ned deposition, 54:11-55:22)

10. When out of the vehicle, Drummond could have run away in his manic state, handcuffed or not. That danger was of great concern to [defendants Ned, Valentine, and Brian McElhaney ("McElhaney")] on the scene. (McElhaney deposition, 28:13-19)

11. Drummond's continued combativeness caused police to attempt to control him by placing Drummond on the ground to subdue him and prevent him from fleeing. (Valentine deposition, 47:6-22)

12. This struggle continued on the parking lot as three officers were unable to gain Drummond's compliance

or keep him safely under control without keeping him down on the ground. (Kimbrough deposition, 59:13-60:4)

13. Officers tried a second time to place [Drummond] into the patrol car, but he was too combative. (Ned deposition, 64:13-66:11)

14. Officers repeatedly requested the ambulance to get there. (Exhibit C, Call History; Valentine deposition, 59:1-7)

15. Officers estimate that [Drummond] was on the ground, the second time being restrained for approximately 18 minutes, with [Drummond] struggling with them the entire time. (Valentine deposition, 55:1-25; Ned deposition, 73:24-74:25; Kimbrough deposition, 63:10-14)

16. The officers never placed their entire weight on [Drummond], and they had their feet on the ground at all times. (Ned deposition, 71:9-16; McElhaney deposition, 36:15-25; Kimbrough deposition, 43:11-44:1)

17. They also periodically lessened the pressure they were placing on his back and shoulder area. (Kimbrough deposition, 52:22-53:7; McElhaney deposition, 38:4-23); Valentine deposition, 56:1-10)

18. Occasionally, [Drummond] would tell the officers that he would stop, and when the officers let up, he would try to flee or injure the officers. (McElhaney deposition, 38:4-23 & 39:6-25)

19. Although witnesses [Kimbrough and Calleja] may have heard [Drummond] state [that] he couldn't breathe and that he wanted a glass of water, this was considered a ploy. (Kimbrough deposition, 39:12-40:3)

20. The officers [did not have] reason to believe that [Drummond] couldn't breathe. (Valentine deposition, 57:1-25; McElhaney deposition, 65:10-66:1; Ned deposition, 68:21-69:16 & 74:22-75:9)

21. After a fourth officer, [defendant] Gregory Sawyer [("Sawyer")] arrived, he tried to control [Drummond's] legs, but [Drummond] kicked him away. (Sawyer deposition, 38:14-39:23)

22. A leg restraint was then located and [placed on] Drummond's ankles only [by defendant Sawyer]. As soon as his legs were restrained, Drummond suddenly became unusually docile whereupon officers determined he had lost consciousness. (Valentine deposition, 61:1-25-62:9)

23. Officers immediately released plaintiff from the restraints, called paramedics and initiated CPR. (Valentine deposition, 63:12-20; Exhibit C, Call History)

24. [Drummond] was ultimately revived but he sustained brain damage. (McElhaney deposition, 54:23-55:2)

25. [Drummond] had kicked [defendant] Sawyer knocking him off balance less than three minutes before paramedics were summoned to revive him. (Exhibit C, Call History; Sawyer deposition, 38:14-39:23 & 41:15-22)

26. Significantly, the coroner's toxicological results indicated [Drummond] was under the influence of cocaine and alcohol with cocaine metabolite levels of 1310 Ng/Ml. (Breen deposition, 14:12-16:2 with attached coroner's toxicological report)

27. [Drummond] initially disputed the presence of illegal drugs, but his experts have now conceded the

toxicology findings are correct. [Drummond's] First Amended Complaint, p. 7, ¶ 23; Breen deposition, 8:2-6)

28. In addition, [Grave's] testified that she ejected [Drummond] from her home because she found him with a cocaine pipe in the early morning hours of March 26, [1999,] the day of the incident. (Graves deposition, 25:14-26:17)

29. [Graves] testified that [Drummond] had been released from his "drug rehab" program just a few weeks earlier. (Graves deposition, 16:1-20)

30. [Drummond] claims (through his guardian ad litem) that he was asphyxiated by the defendant officers when they placed him face down, with handcuffs on. (Plaintiff's First Amended Complaint, p. 6, ¶ 19, lines 10-16)

31. The police did not strike or kick plaintiff or use any weapon on him. (Ned deposition, 113:22-114:7; Kimbrough deposition, 34:4-7)

32. The emergency room physician [Dr. David Reid ("Reid"),] who examined [Drummond] that night found no signs of trauma to the head, neck area or torso. (Reid declaration, p. 2, ¶ 5; Exhibit A, pp. 3-4 of West Anaheim Medical Center Emergency Room Medical report of David Reid's, M.D., physical examination of plaintiff)

33. [Drummond] continued to spew profanities at the officers from the ground until just seconds before they determined he was not responding and he required CPR. (Kimbrough deposition, 38:1-10 & 43:11-45:1)

34. The sudden cessation of such conduct is what alerted officers to the possibility of a problem. (Valentine deposition, 62:1-9)

Based on the foregoing Uncontroverted facts, the Court now [concludes as follows.]

CONCLUSIONS OF LAW

1. Defendants are entitled to Qualified Immunity as a matter of law. [*See Sancier v. Katz*, 121 S.Ct. 2151, 2156 (2001)]

A. There was no constitutional violation [by any defendant.]

B. There is no clearly established law which renders the defendant officers' actions unconstitutional. [Unlike *Headwater**, defendant force was not shown to be unnecessary or unreasonable]

C. The officers actions were objectively reasonable. [*People v. Rutherford*, 272 F.3d 1272, 1285 (2001).]

2. There was no constitutional violation, thus plaintiff's *Monell* claim is without merit.

3. Absent any constitutional violations, the plaintiff's negligent hiring and retention and remaining state law claims are without merit. [*See Edson, et al. v. City of Anaheim, et al.*, 63 Cal. App. 1269, 1274 (1998)]

[* *Headwaters Forest Defense v. County of Humbolt, et al.*, 2002 WL 27668 (9th Cir. 2002) Cited to Court and counsel at oral argument by plaintiff's counsel.]

4. Judgment shall be entered in defendants' favor consistent herewith.

DATED January 15, 2002.

/s/ Alicemarie H. Stotler
HONORABLE
ALICEMARIE H. STOTLER
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN THOMAS DRUMMOND,

Plaintiff-Appellant,

v.

CITY OF ANAHEIM, A California Municipal Entity; ANAHEIM POLICE DEPARTMENT, a California Municipal Entity; ROGER BAKER; CHRISTOPHER NED, KRISTI VALENTINE; BRIAN MCELHANEY; GREGORY SAWYER,

Defendants-Appellees,

No. 02-55320

D.C. No. CV-00-00243-AHS

ORDER

(Filed: Nov. 4, 2003)

Before: BROWNING, PREGERSON, and REINHARDT, Circuit Judges.

The petition for rehearing and rehearing en banc is denied.

28 USCS § 1254 (2003)

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

---

42 USCS § 1983 (2003)

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

JACK L. WHITE, CITY ATTORNEY
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Attorneys for Defendants

(Filed: Dec. 3, 2001)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN THOMAS DRUMMOND, by and through his guardian ad litem, THOMAS R. DRUMMOND, Plaintiff, vs. CITY OF ANAHEIM, et al. Defendants.	CASE NO: SACV00-243 AHS (ANx) DECLARATION OF DAVID REID, M.D., IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATE: January 14, 2002 TIME: 10:00 a.m. COURTROOM: 10A HONORABLE ALICEMARIE STOTLER

I, David Reid M.D., declare as follows:

1. I have personal knowledge of each matter stated herein for the following reasons, I was the emergency room physician at West Anaheim Medical Center who attended to and examined Brian Drummond on March 26, 1999, and the person who dictated, reviewed, and executed

the medical report of the examination of Brian Drummond on the same date.

2. The medical report, which is marked as Exhibit A to the motion, was made and kept by West Anaheim Medical Center in the course of its regularly conducted business.

3. It is a regular practice of West Anaheim Medical Center to produce such a medical report.

4. I dictated the report on March 27, 1999, at approximately 1:35 a.m. The transcribed report is a true and accurate report of the information I dictated. I reviewed and executed the transcribed report on 3/29/99.

5. As set forth in the report, my examination of Brian Drummond on March 26, 1999, revealed no evidence of trauma to his neck. Additionally, his entire torso revealed no evidence of trauma or abrasions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed within the Untied [sic] States on November 29, 2001.

/s/ David Reid
David Reid, M.D.

1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the

within action; my business address is 200 S. Anaheim Boulevard, Suite 356, Anaheim, California 92805.

On, December 3, 2001, I served the foregoing document described as **DECLARATION OF DR. DAVID REID IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** on interested parties in this action by placing the true copies there of enclosed in sealed envelopes addressed to as stated as follows or on the attached mailing list:

Marc A. Karlin Karlin & Karlin 3701 Wilshire Blvd. Ste. 1035 Los Angeles, CA 90010-2804	Kent M. Henderson, Esq. Law Offices of Federico Sayre 450 Newport Center Drive, #650 Newport Beach, CA 92660-7610
Norman Watkins, Esq. Lynberg & Watkins 333 City Blvd. West, #640 Orange, CA 92868	

(X) BY MAIL: As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Anaheim, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

( ) BY FACSIMILE: I caused the contents of said envelope to be delivered by Facsimile machine to the number indicated after the address(e's) noted.

( ) BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the address(e's) noted.

(**X**) (Federal) I declare that I employed in the office of a member of the bar of this court at whose direction the service was made.

( ) (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 3, 2001, at Anaheim, California.

/s/ Mary L. Coates
MARY L. COATES

KENT M. HENDERSON, ESQ., SBN 139530
LAW OFFICES OF FEDERICO CASTELAN SAYRE
900 North Broadway, 7th Floor
Santa Ana, California 92701
Phone (714) 550-9117

Attorneys for Plaintiff BRIAN THOMAS DRUMMOND, by and through his Guardian ad Litem, THOMAS R. DRUMMOND

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

BRIAN THOMAS DRUMMOND, by and through his Guardian ad Litem, THOMAS R. DRUMMOND, Plaintiff, vs. CITY OR [sic] ANAHEIM, a California municipal entity; ANAHEIM POLICE DEPARTMENT, a California municipal entity; ROGER BAKER; ANAHEIM POLICE DEPARTMENT OFFICERS, the identity and number of whom are presently unknown to plaintiff; and Does 1-10, inclusive, Defendants.	**CASE NO. SA CV 00-243 AHS (ANx)** **PLAINTIFFS' STATEMENT OF CONTROVERTED FACTS AND CONCLUSIONS OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIMS SET FORTH IN THE COMPLAINT** DATE: January 14, 2001 TIME: 10:00 a.m. COURTROOM: 10A HONORABLE ALICE-MARIE STOTLER (Filed Jan. 3, 2002)

Plaintiff hereby submit [sic] the following Plaintiffs' Statement of Controverted Facts and Conclusions of Law pursuant to Central District of California Local Rule 56 in Opposition to the Summary Judgment as to Plaintiff's Claims Set Forth in the Complaint filed by Defendants.

MOVING PARTY'S ALLEGED UNCONTROVERTED FACTS	PLAINTIFFS RESPONSE
1. On March 26, 1999, Anaheim police were contacted by Drummond's neighbor Kimbrough and Creath with a report that Drummond posed a threat to the residents and to himself. (Kimbrough deposition, 24:9-25; 26:2-6	1. Undisputed.
2. When police responded, they recognized Drummond as the same subject of a call from Drummond's girlfriend on March 25th wherein she had requested police take him into custody as a § 1550 (danger to himself and other). (Ned deposition, 44:10-15; Graves deposition, 19:20-20:24; Valentine deposition, 34:6-35:3).	2. Disputed in part and undisputed in part. Undisputed that Ms. Graves called with regard to Welf. & Inst. Code § 5150. Disputed as to the implication that he presented a danger to others. Ms. Graves testified that Plaintiff had bipolar disorder, had not been taking his medication, had possibly been using narcotics and that "she wanted him to be taken into a hospital, that he needed medical help, that I was

	worried for him." (Ramirez Dec., Exhibit 1, Graves Dep. 19:11-22:16) .Plaintiff also objects that Defendants' statement misstates the law. Welf. & Inst. Code § 5150 refers not to a situation, as Defendants maintain, when a person is a "danger to himself and others" but "[w]hen any person, as a result of mental disorder, is a danger to others, **or** to himself or herself, **or** gravely disabled".
3. When police located him on a busy Anaheim street shortly before 10:00 p.m., Officers noted that Drummond was hallucinating, sweating and incoherent. (Ned deposition, 45:5-9; Valentine deposition, 34:6-35:3; Exhibit C, Call History).	3. Undisputed.
4. When police attempted to speak with him, he appeared to be moving toward the busy Magnolia Street. (Valentine deposition, 44:18-45:5).	4. Undisputed
5. When they contacted his girlfriend to enlist her aid in calming Drummond, she refused to speak with Drummond. (Graves deposition, 33:24-35:19).	5. Disputed in part and undisputed in part. The officers, despite the fact that the [sic] they claimed that Drummond wanted to kill himself, wanted To return

	Drummond to Graves; residence or to have her transport him to the hospital. (Ramirez Dec., Exh. "2", Graves Dep. 34:16-35:12) Police expert Dusenbury states that such conduct by the officers would be misconduct. See Plaintiff's Material Facts ("PMF") 22 and 23, below.
6. With no other options apparent to them, Police on the scene therefore made a decision to take him into custody for his own safety for transportation to a local health care facility under W.I.§ 5150 evaluation. (Ned deposition, 52:1-16).	6. Undisputed.
7. In his agitated and clearly hallucinative state, Drummond resisted but police succeeded in placing handcuffs on him and requested an ambulance. (Ned deposition, 53:1-23; McElhaney deposition, 25:20-26:13; Exhibit C, Call History).	7. Disputed. Independent witness Victor Manuel Calleja states that Drummond was not resisting the officers. (Ramirez Dec., Exh. "3", Calleja Interview taken by D.A.'s Office, p.2)
8. Anaheim's practice was to arrange for the transportation of violent subjects such as Drummond to a medical facility by ambulance, strapped to a gurney. (Rodig deposition, 65:24-66:4, 93:17-96:20).	8. Undisputed.

9. Drummond continued to resist and fight with police as they attempted to seat him in a patrol car to await the ambulance. They violent resistance. (Sic) (Ned deposition, 54:11-55:22).	9. Disputed. See No. 7, above.
10. When out of the vehicle, Drummond could easily have run away in his manic state, handcuffed or not. That danger was of great concern to officers on the scene. (McElhaney deposition, 28:13-19).	10. Disputed. After he was cuffed he presented little objectively reasonable threat of flight or to the safety of the officers, and the cavalier, perhaps malicious, attitude of the officers. (Dusenbury Dec. ¶¶ 4,8)
11. Drummond's continued combatativeness caused police to attempt to control him by placing Drummond on the ground to subdue him and prevent him from fleeing. (Valentine deposition, 47:6-22).	11. Disputed. Police practices expert Dusenbury opines: Although the officers maintain that placing Drummond in the prone position and placing their body weigh [sic] on his torso was necessary for their safety and to prevent his fleeing, they should have restrained him by taking him to his knees and then applying a leg restraint. He was handcuffed behind the back at the time. After application of a leg restraint, he could have then been placed the police vehicle, "seat-belted", and safely transported. There is no purpose to be served by placing Drummond on the ground except,

	momentarily, unless the officers intend to apply leg restraints. (Dusenbury Dec., ¶ 8,
12. This struggle continued on the parking lot as three officers were unable to gain Drummond's compliance or keep him safely under control without keeping him down on the ground. (Kimbrough deposition, 59:13-60:4).	12. Disputed. Independent witness Calleja, states that Drummond did not resist. See No. 7, above. Also, the method of restraining Drummond was unnecessary and constituted misconduct. See No. 11, above.
13. Officers tried a second time to place plaintiff into the patrol car, but he was too combative. (Ned deposition, 64:13-66:11).	13. Disputed. Calleja states he did not resist. See No. 7, above. Although the officers claim that they never put Drummond in the patrol car, Kimbrough testifies that they placed him in the car and then removed him and put him back on the ground. (Ramirez Dec., Exh. "4", Kimbrough Dep. 31:18-32:1)
14. Officers repeatedly requested the ambulance to get there. (Exhibit C, Call history; Valentine deposition. 59:1-7).	14. Undisputed.
15. Officer estimate [sic] that plaintiff was on the ground, the second time being restrained for approximately 18 minutes, with plaintiff struggling with them the entire time. (Valentine deposition,	15. Disputed. Kimbrough estimates that the total time they had him on the ground was for an hour. (Ramirez Dec., Exh. "4", Kimbrough Dep. 35:19-20)

55:1-25; Ned deposition, 73:24-74:25; Kimbrough deposition, 63:10-14).	
16. The officers never placed their entire weight on the plaintiff, and they had their feet on the ground at all times. (Ned deposition, 71:9-16; McElhaney deposition, 36:15-25; Kimbrough deposition, 43:11-44:1).	16. Disputed. Even Kimbrough, who Dusenbury's report describes as being "pro-police", admits that Valentine put her full weight on him and that all three officers were sitting on him at the same time. (Ramirez Dec., Exh. "4", Kimbrough Dep. 32:19-21, 33:17-19)
17. They also periodically lessened the pressure they were placing on his back and shoulder area. (Kimbrough deposition, 52:22-53:7); McElhaney deposition, 38:4-23); Valentine deposition, 56:1-10).	17. Disputed. Objection misstates Kimbrough's testimony. When asked what the officers said when Drummond told them he was having a hard time breathing, Kimbrough says they just told him to relax. (Ramirez Dec., Exh. "4". Kimbrough Dep. 52:22-53-7) However, when asked what they did when Drummond complained of breathing problems, he says "They just – basically, ther [sic] really did nothing. I mean they kept their position." (Kimbrough Dep. 51:21-25)
18. Occasionally, plaintiff would tell the officers that he would stop, and when the officers let up, he would try	18. Disputed. Calleja states that Drummond did not resist. See No. 7, above

to flee or injure the officers. (McElhaney deposition. [illegible & 39:6-25).	
19. Although witnesses may have heard plaintiff state he couldn't breathe and that he wanted a glass of water, this was considered a ploy (Kimbrough deposition. 39:12-40:3).	19. Disputed in part and undisputed in part. Undisputed that Plaintiff was unable to breathe and that he told the officers so. Calleja also stated that Plaintiff said he could not breathe and considered his pleas legitimate. (Calleja Dec.) Further it is disingenuous, and tests the credulity of the court, for Defendants to imply that they considered Plaintiff's pleas a ploy, when each of the officers dubiously denies that he made such pleas. (Ramirez Dec., Exh. 6, Valentine Dep., 57:4-20) Defendants can not blow both hot and cold at the same time.
20. The officers had no reason to believe that plaintiff couldn't breathe. (Valentine deposition, 57:1-25, McElhaney deposition, 65-10-66:1; Ned deposition, 68:21-69; 16 & 74:22-75:9).	20. Disputed. Both Calleja and Kimbrough state that Plaintiff told the officers that he could not breathe. (Calleja Dec., ¶ 5; Ramirez Dec., Exh. "4", Kimbrough Dep. 51:19-25)
21. After a fourth officer Gregory Sawyer arrived, he tried to control the plaintiff's legs, but plaintiff kicked him away. (Sawyer deposition, 38:14-39:23).	21. Disputed in part and undisputed in part. Undisputed that Plaintiff may have done so and that Sawyer pushed Plaintiff's legs into a hogtie-like position. Disputed

	as to any inference that Plaintiff was acting violently – all evidence suggests that he was being asphyxiated, as he purportedly expired immediately after this kick. Plaitniff [sic] may have used his last breath to throw off Sawyer, who in addition to the weight of the other officers was lifting Plaintiff's legs off the ground so that they no longer supported their own weight, and added his own weight to that and pushed them towards his buttocks so that even greater weigh was resting on Drummonds torso, compressing his lungs. (Ramirez Dec., Exh. "7", Sawyer Dep. 38:16-41:14)
22. A leg restraint was then located and used at Drummond's ankles only. As soon as his legs were restrained, Drummond suddenly became unusually docile whereupon officers determined he had lost consciousness. (Valentine deposition, 61:1-25-62:9).	22. Undisputed.

23. Officers immediately released plaintiff from the restraints, called paramedics and initiated CPR. (Valentine deposition, 63-12-20; Exhibit C, Call History).	23. Undisputed
24. Plaintiff was ultimately revived but he sustained brain damage. (McElhaney deposition, 54:23-55:2).	24. Undisputed.
25. The plaintiff had kicked Sawyer knocking him off balance less than three minutes before paramedics were summoned to revive him. (Exhibit C, Call History; Sawyer deposition, 38:14-39:23 & 41:15-22).	25. Disputed in part and undisputed in part. See No. 21, above.
26. Significantly, the coroner's toxicological results indicated plaintiff was under the influence of cocaine and alcohol with cocaine metabolite levels of 1310 Mg/M1. (Breen deposition 14:12—16:2 with	26. Undisputed.

JACK L. WHITE, CITY ATTORNEY
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Attorneys for Defendants

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BRIAN THOMAS DRUMMOND, by and through his guardian ad litem, THOMAS R. DRUMMOND, Plaintiff, vs. CITY OF ANAHEIM, et al. Defendants.	CASE NO: SACV00-243 AHS (ANx) DEFENDANTS' OBJECTION TO PLAINTIFF'S EVIDENCE IN SUPPORT OF OPPOSITION TO SUMMARY JUDGMENT DATE: January 14, 2002 TIME: 10:00 a.m. COURTROOM: 10A HONORABLE ALICEMARIE STOTLER (Filed Jan. 7, 2002)

Defendants hereby object to the following evidence presented by Plaintiff in connection with his Opposition to Motion for Summary Judgment, set for hearing on January 14, 2002, before this Court:

1. Exhibit 5, the Anaheim Police Department Supplemental Report re Witness Calleja. Said exhibit is inadmissable hearsay and not property authenticated.

2. Exhibits 1 and 2 attached to David Dusenbury's Declaration, opinion letters dated January 26, 2001, and March 16, 2001, respectively. The exhibits consist of inadmissible hearsay and are irrelevant inasmuch as plaintiff failed to include its contents in either the declaration itself or his statement of controverted facts and conclusions of law. Both exhibits contain numerous opinions expressed by Mr. Dusenbury wherein he relies on audio reports, deposition transcripts, or reports, copies of which were not included therein. Moreover, the exhibits only contain Mr. Dusenbury's synopsis of the audio reports, deposition transcripts or reports. The court should therefore rule that said exhibits are inadmissible for the purposes of this motion.

3. Numbers 26 and 27 of plaintiff's Statement of Controverted Facts. Said "controverted facts" presented by plaintiff are irrelevant and an improper attack on the defendant officer's credibility. See Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* (The Rutter Group 2001), §14:249, p.14-64.2.

Dated: January 7, 2002 JACK L. WHITE,
CITY ATTORNEY

BY /s/ Deborah P. Knefel
Deborah P. Knefel
Deputy City Attorney
Attorneys for Defendants

PROOF OF SERVICE

1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA)
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 200 S. Anaheim Boulevard, Suite 356, Anaheim, California 92805.

On, January 7, 2002, I served the foregoing document described as **DEFENDANTS' ~~OBJE~~CTION TO PLAINTIFF'S EVIDENCE IN SUPPORT OF OPPOSITION TO SUMMARY JUDGMENT** on interested parties in this action by placing the true copies there of enclosed in sealed envelopes addressed to as stated as follows or on the attached mailing list:

Marc A. Karlin Karlin & Karlin 3701 Wilshire Blvd. Ste. 1035 Los Angeles, CA 90010-2804	Kent M. Henderson, Esq. Law Offices of Federico Sayre 450 Newport Center Drive, #650 Newport Beach, CA 92660-7610
Norman Watkins, Esq. Lynberg & Watkins 333 City Blvd. West, #640 Orange, CA 92868	

(X) BY MAIL: As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Anaheim, California in

the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

( ) BY FACSIMILE: I caused the contents of said envelope to be delivered by Facsimile machine to the number indicated after the address(e's) noted.

( ) BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the address(e's) noted.

(X) (Federal) I declare that I employed in the office of a member of the bar of this court at whose direction the service was made.

( ) (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 7, 2002, at Anaheim, California.

/s/ Mary L. Coates
MARY L. COATES

TERMED APPEAL
(ANx)

U.S. District Court
Central District of California (Southern Div)

CIVIL DOCKET FOR CASE #: 00-CV-243

Brian Drummond v.
City of Anaheim, et al
Assigned to:
Judge Alicemarie H. Stotler
Referred to:
Discovery Arthur Nakazato
Demand: $1,000,000
Lead Docket: None
Dkt# in other court: None

Filed: 03/08/00
Jury demand: Both
Nature of Suit: 440
Jurisdiction:
Federal Question

Cause: 28:1331 Federal Question: Other Civil Rights

BRIAN THOMAS DRUMMOND, by and through his Guardian Ad Litem Thomas R Drummond plaintiff	Marc A Karlin FAX 213-383-1166 [COR LD NTC] Karlin & Karlin 3701 Wilshire Blvd, Ste 1035 Los Angeles, CA 90010-2804 213-365-1555
	Federico Castelan Sayre FAX 714-550-9125 [COR LD NTC] Federico C Sayre Law Offices 900 N Broadway, 7th Fl Santa Ana, CA 92701 714-550-9117
v.	
CITY OF ANAHEIM, a California municipal entity defendant	Norman J Watkins FAX 714-937-1003 [COR LD NTC] Lynberg & Watkins 333 City Blvd W, Ste 640 Orange, CA 92868-5915 714-937-1010

Jack L White
[COR LD NTC]
Deborah P Knefel
[COR LD NTC]
Anaheim City Attorney Office
200 S Anaheim Blvd
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Anaheim, CA 92805
714-765-5169

* * *

1/7/02	98	OBJ TO PLF'S EVID by defendant City Of Anaheim, defendant Anaheim Police Dept, defendant Roger Baker, defendant Anaheim P.D. Officer, defendant Christopher Ned, defendant Kristi Valentine, defendant Brian McElhaney, defendant Gregory Sawyer in support of opposition to motion for summary judgment [87-1] (ts) [Entry date 01/09/02]

* * *

(2)

No. 03-1268

Supreme Court, U.S.
FILED
MAY 10 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF ANAHEIM, a California Municipal Entity; ANAHEIM POLICE DEPARTMENT, a California Municipal Entity; ROGER BAKER; CHRISTOPHER NED; KRISTI VALENTINE; BRIAN MCELHANEY; GREGORY SAWYER,

Petitioners,

vs.

BRIAN THOMAS DRUMMOND, by and through his Guardian Ad Litem Thomas R. Drummond,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT BRIAN THOMAS DRUMMOND, by and through his Guardian Ad Litem Thomas R. Drummond

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Attorneys for Respondent

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the police officers' act of crushing a detainee against the ground by pressing their weight onto his neck and torso as he lay handcuffed on ground and begged for air when he was wanted for no crime constituted excessive force as a matter of clearly established law, when their own department policies as well as other sources fairly warned them of the deadliness[1] of such conduct?

2. Where the district court found the officers did not have reason to believe that Drummond could not breath, despite two independent witnesses who said he begged for air, and the appellate court reversed it by holding that it erred in its predicate judgment that the facts alleged do not support a finding of a constitutional violation because officers – indeed, any reasonable person – should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable, can the Appellate Court be said to have departed drastically from the standards of review on summary judgment?

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[1] Respondent here uses the term "deadliness" in its colloquial sense of being capable of causing serious injury or death, not in the sense of the legal term of art "deadly force", meaning reasonably likely to cause death. The Court of Appeals neither made the determination that there was deadly force, nor was such a determination necessary to their holding.

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BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The questions raised by the petitioners rest largely on mischaracterizations of the record and do not present any real issue suitable for review by this court. Contrary to the petitioners' strained assertions, there is not an intercircuit conflict of authority, nor is there a conflict with any decision of this Court, nor has the appellate court departed drastically from the standard on summary judgment. Moreover, there is no undecided federal or constitutional question at issue in this case. The questions which petitioners endeavor to set forth are not in reality presented by this case.

As will be demonstrated *infra*, the ostensible conflict between the opinion below and other circuits is exclusively an instance of differences distinguishable on the facts of the cases.

Petitioners' assertion that the Ninth Circuit extended the concept of "clearly established law" beyond that recognized by this Court is not well founded. The Ninth Circuit looked to matters which this Court has recognized as proper in determining whether the constitutional violation was clearly established, including existing case law and the police department's own policies. Petitioners' attempt to characterize their conduct as an innocuous sort of "impact free restraint" is disingenuous in light of the fact that their own policies warn that the tactic used may cause death. Likewise, their assertion that the Ninth Circuit relied upon the supposedly debunked theory of "positional asphyxia" is a misstatement. Neither the Appellate Court nor respondent's expert physician relied upon the theory of positional asphyxia. The physician recognized that it was the mechanical compression of respondent's rib cage which prevented him from breathing properly. It is a mischaracterization of the facts to suggest

that respondent's case relied upon any questionable medical or scientific theory.

Petitioners' second question presented, which raises the issue of the Ninth Circuit's purported *post hoc* analysis "based largely on plaintiff's comatose condition" to somehow portray an "otherwise minimal restraint" as severe force is a red herring. The Ninth Circuit did not simply reason from respondent's injury to the severity of the force. The officers had fair and ample warning of the deadliness and the severity of the force from multiple sources and the Appellate Court, likewise, looked to the facts surrounding the use of force and the warnings which the officers received.

Petitioners' last question presented, whether the Ninth Circuit Court of Appeals drastically departed from the standard of review on summary judgment, is not truly an issue raised by this case. Petitioners maintain that admission of a single piece of evidence, a statement by a witness that petitioner was not resisting, amounted to a drastic deviation from the ordinary course of judicial proceedings. Petitioners' assertion that the Appellate Court relied "exclusively" on this evidence is a misstatement and is misleading as to the appropriate test for excessive force. The Appellate Court also considered the fact that respondent was already cuffed when the force was applied to him, the police expert's opinion that he presented little objectively reasonable threat of flight or harm after being cuffed, and the fact that he was wanted for no crime. Given these circumstances, even without the contested piece of evidence, the Appellate Court would have reached the same conclusion: the degree of force was not warranted. In actuality, the court which did ignore the standards for summary judgment was the District Court. Among numerous other errors, it made the illogical finding that the officers had no reason to believe that the respondent was in respiratory distress, despite the fact that two witnesses stated that he begged for air numerous times.

That Petitioners' argument for the appropriateness of reviewing this case is based on misstatements and omissions is born out by the fact that they omitted crucial parts of Plaintiffs' Statement of Controverted Facts from their Appendix. This document appears, in part only, in Petitioners' Appendix at pages 41 to 50. Although the document contains the petitioners' first 26 alleged uncontroverted facts and respondent's responses thereto, it does not contain petitioners' eight remaining facts (27-34) and respondent's responses thereto, and most importantly, it tellingly omits respondent's 27 additional material facts which are crucial to the case and to the appropriateness of summary judgment. Omission of the additional material facts would tend to create the false impression that there are questions presented by this case which are suitable for Supreme Court review. To clarify matters, respondent has included the full document within respondent's Appendix. The Court should be secure in the understanding that this case presents no questions adequate for review.

STATEMENT OF THE CASE

Plaintiff, Brian Drummond, is a Caucasian male who was (at the time of the incident in question) in his early thirties, who has been in a persistent vegetative state or coma as a result of hypoxic encephalopathy from his cardiopulmonary arrest on March 26, 1999, and his treating physician Sunil Arora, M.D. expects him to remain in a vegetative state for the rest of his life. App. 14.

Mr. Drummond's cardiopulmonary arrest was the result of a lack of oxygen to his heart caused by mechanical compression of his chest from police officers setting atop his back. App. 15.

Mr. Drummond has a history of bipolar or manic depressive disorder and schizophrenia. App. 15.

On March 25, 1999, the night before the incident upon which this matter is based, Mr. Drummond's fianceé Olivia

Graves called the police because he had run out of his medication, was experiencing hallucinations and paranoia, and she "wanted him to be taken into a hospital, that he needed medical help, that [she] was worried for him." App. 15.

Two of the officers who responded to the call, Officers Ned and Valentine, were the same as those involved in the subject incident the following night. Ned was the training officer for Valentine, who was a rookie. The officers told Ms. Graves that "they were not a taxi cab" and that they did not think Drummond fit the criteria for a psychiatric hold under California Welf. & Inst. § 5150. App. 15.

The officers were acting in a "not very professional" manner, "joking around a lot", "just saying stuff to each other and laughing", and meanwhile Graves "was in a very serious emotion at that time, [she] wasn't too happy to hear them giggling and making jokes." App. 15.

The next night, the night of the incident, March 26, 1999, Mr. Drummond was in a 7-11 parking lot, unarmed but acting in an unusual manner when a § 5150 call went out to Anaheim police units. The call essentially meant that Mr. Drummond needed medical transport [he was halucianating that snakes and alligators were after him].

A witness, Victor Manuel Calleja, was present when an African American officer (Ned) "knock[ed] Mr. Drummond to the ground where the officers cuffed his arms behind his back as Mr. Drummond lay on his stomach." App. 15.

Calleja related to a District Attorney's Office investigator that: "Drummond was not resisting the officers." App. 16.

The officers left Drummond in the prone position, lying face down on his stomach. "A white officer (McElhaney) put his knees into Mr. Drummond's back and

placed the weight of his body on him. The African American officer also put his knees and placed the weight of his body on him, except that he had one knee on Mr. Drummond's neck." App. 16.

The officers admitted they performed a weapons search sufficient to locate any weapons but found none.

"Mr. Drummond repeatedly told the officers that he could not breathe and that they were choking him. He also told them that he was thirsty and needed a glass of water. The officers however continued to put their weight upon Mr. Drummond's back and neck. [Calleja, the witness] was shocked and surprised that the officers continued to do this when they were obviously causing him to have trouble breathing." App. 16. Despite his pleas that he was having trouble breathing and that they were choking him, the officers continued to apply pressure to Drummond's back for approximately 45 minutes until he ceased breathing.

David Kimbrough, another witness, corroborates Calleja's assertion that Drummond told the officers that he couldn't breathe, and that when he said this the officers did nothing but remain in their position. App. 16.

"The officers were laughing during the course of these events. When the African American officer placed his knee upon Mr. Drummond's neck and one of the white male officers had his knees on Drummond's back the other officers stood around and laughed This statement was taken down by the Anaheim police from Calleja on the night of the incident. App. 16.

Officer Ned estimated he weighed approximately 225 pounds at the time and that Drummond weighed about 160.

"After continuing to put the weight of their bodies on him, Mr. Drummond went limp. The female officer [Valentine] checked his pulse and then they removed his cuffs and turned him over. They then attempted to perform CPR

on him. Then the paramedics arrived and continued trying to revive him." App. 17.

"One of the white officers wanted to ask [Calleja] questions but [he] would not talk to him. Then another officer who had arrived later told [Calleja] that he was a supervisor and that he wanted to hear [his] side of the story. Although Spanish is [Calleja's] first language, [he] spoke to him in English. [He] told him that it was not right, what they did. Because [he] thought Mr. Drummond was dead, [he] told the officer, 'I will tell the family that you killed him.' [He] also told him, 'The black guy put his knee on the back of the neck and the other officers were standing around laughing.'" App. 17.

Sunil Arora, M.D., one of Drummond's treating physicians, a cardiopulmonary expert and Director of the Neurological Care Unit at the hospital where Drummond is residing and being treated, opines to a reasonable medical probability that "on March 26, 1999 [Drummond] suffered a cardiopulmonary arrest caused by lack of oxygen to his heart. The lack of oxygen to his heart was caused by his inability to breathe caused by mechanical compression of his chest wall such that he could not inhale and exhale in a normal manner. I believe that this occurred when he was facedown on the ground and the police officers set upon his back preventing the anterior wall of his chest from expanding." App. 17.

Arora also notes that, after the incident, the medical records note that Drummond had multiple abrasions and bruises and lacerations to his right wrist. The records also noted "Orthopedic Injury" as "(R) shoulder – pop out (R) knee injury". Arora found this consistent with his opinion. App. 18.

David Dusenbury, former Deputy Chief of the Long Beach Police Department, with 30 years experience as a police officer, who also conducted a "Use of Force Study"

for the Chief of Police, surveying 14 California police departments, opines that: "the police officers used inappropriate restraining force and failed to comply with their Department policies and procedures regarding someone who is suspected of being under the influence of drugs and acting violently. A reasonable police officer would have complied with the policies of the Anaheim Police Department regarding such circumstances. The reasons why reasonable police officers could not believe that they were acting appropriately in this case include the facts that there were numerous and egregious violations of standard police practice, violations of a number of Anaheim's own policies and procedures, the numerous protestations of Drummond witnessed by at least two independent witnesses that he was unable to breathe, the fact that he was not being stopped for a serious crime but because of his mental disturbance, the fact that after he was cuffed he presented little objectively reasonable threat of flight or to the safety of the officers, and the cavalier, perhaps malicious, attitude of the officers reflected by the fact that, if true, they were laughing at Drummond during the incident. Further, Anaheim's Police Department had longstanding policy for many years before the incident which warned of putting arrestees in Drummond's state at risk of respiratory failure." App. 18-19.

"The officers actions were violations of Anaheim Police Department Manual Section 525.00, 'Control and Transportation of Restrained Subjects':

-Section A., 'If a subject must be maximally restrained, he shall be placed on his right or left side and maintained on his side, and his breathing shall be monitored constantly.'

-Section B., 'Do not place a restrained subject in a face down "prone" position.'

-Section G., 'Supervisors should make every effort to be present on the scene of these incidents.'" App. 19.

"As early as 1992, more than six years before the incident, Anaheim Law Enforcement Bulletin 92-172, dealing with 'Control and Transportation of Restrained Subjects' warned of the proper '[c]ontrol of violent/restive subjects suspected of being mentally disturbed or under the influence of alcohol and/or a controlled substance'. Section 1 speaks of potential risk of interference with respiration and asphyxia when prisoners are transported in a prone position. Section 6 states, 'After being restrained, violent/restive individuals will be constantly monitored.' Section 7 states, 'Supervisors should make every effort to be present on the scene of such incidents.' Anaheim Training Bulletin 96-19 'Positional Asphyxia During Law Enforcement Transport' reiterated in 1996 many of the same and similar warnings. Anaheim Training Bulletin 98-14 'Positional Aspyxia' cites an 'expert in the field' as noting that **'when one or more officer's are kneeling on a subject's back or neck to restrain him, compression asphyxia can result, 'That may be a precipitating factor in causing death.'"** [Emphasis added.] That Bulletin also warns of the danger of the prone position (albeit with regard to transportation), the need to monitor violent/restive individuals after they have been restrained, and that supervisors should make every effort to be present on the scene of such incidents." App. 19-20. Here, the original call and the very purpose of the officers' responding was to control, restrain and transport a subject [here a mentally disturbed man under California Welfare & Institutions Code § 5150 who the officers were attempting to transport in the police unit and/or by ambulance. No supervisor was present at the scene on March 26, 1999 until after Drummond had already ceased breathing.

The April 1998 Bulletin notes that "[t]here are numerous other options now available for restraining a combative subject".

Dusenbury also opines "that Officers Ned, Valentine and McElhaney inappropriately discussed their opinions and tactics in the presence of and within the hearing distance of Brian Drummond, knowing that (including from their encounter with him the previous day) he suffered from some mental illness. Such actions likely exacerbated his paranoia and triggered reactions from him that may not otherwise have occurred. No effort was made to 'talk Drummond into custody' or assure him that they were there to help him not hurt him." App. 20.

Dusenbury further opines: "Although the officers maintain that placing Drummond in the prone position and placing their body weight on his torso was necessary for their safety and to prevent his fleeing, they should have restrained him by taking him to his knees and then applying a leg restraint. He was handcuffed behind the back at the time. After application of a leg restraint, he could have then been placed in the police vehicle, 'seatbelted', and safely transported. There is no purpose to be served by placing Drummond on the ground except, momentarily, unless the officers intend to apply leg restraints." App. 20-21.

On the evening of the incident, one of the officers spoke to Drummond's fianceé, Olivia Graves, on the phone and, despite the fact that Drummond said he wanted to kill himself, asked her either that she take Drummond to the hospital or that they return him to her residence. Dusenbury also opines that returning Drummond to Graves' custody when he is expressing suicidal intent would also be misconduct on the part of the officers. App. 21.

Dusenbury has further opinions as follows: "Use of continuing force on Drummond's back and neck/shoulder area was inappropriate and dangerous, particularly for a suspected mentally ill person who was suspected of having ingested drugs. It is common knowledge among citizens and police that a sufficient amount of force exerted on the chest or back of an individual will interfere with normal breathing. Not only was this a violation of standard police practices but was also a violation of Anaheim Police Department policy. The fact that their own Department had articulated numerous times, beginning more than six years before the incident, if not earlier, a policy against interfering with the respiration of individuals such as Drummond in this manner, the officers could not reasonably claim they were mistaken as to the appropriateness of their use of restraining force. The fact that, if true, they laughed at Drummond and ignored his pleas to let him breathe further eliminates the possibility that they could have been reasonably mistaken about their conduct." App. 21-22.

It should be noted that two of the officers involved in this incident have had serious discipline problems. Sawyer has been disciplined three times and Ned was given a discipline just short of termination. Officer Ned had received a 90-day suspension for Violation of Rules, Unbecoming Conduct, Unsatisfactory Performance, and Departmental Reports/Memos (reported 11/28/98 – four months before the incident). App. 22.[2]

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[2] This paragraph founded upon Petitioners' Answers to Interrogatories, though largely omitted from respondent's Statement of Controverted Facts due to a clerical error, was part of the record in the District Court and the record on appeal. All of the facts stated in this Statement

(Continued on following page)

Officer Sawyer had received Counseling for Unsatisfactory Performance and Use of Weapons (5/31/95), a Written Reprimand for Unbecoming Conduct, Unsatisfactory Performance (6/26/98), and a subsequent 25-hour suspension for Violation of Rules, Unbecoming Conduct, Unsatisfactory Performance and Identification (12/2/00). Dusenbury notes that the discipline received by Ned is just short of termination. App. 22.

After filing the notice of appeal, respondent discovered facts which had been concealed by petitioners during discovery, namely that the Orange County District Attorney's Office had referred a matter to the State Attorney General for prosecution of Officer Ned for the crimes of perjury and falsification of a police report. The Attorney General's office concluded that Officer Ned had clearly falsified a police report and lied under oath and only declined to prosecute Officer Ned because of its concern about the element of materiality, and suggested to the Anaheim Police Department that it take administrative action against Officer Ned.

Based upon the developments relating to the concealed facts, respondent filed a *Crateo*[3] motion with the district court seeking an indication of its willingness, if given a limited remand, to entertain a motion to reopen the case[4]. The District Court denied the motion. If the district court had indicated such a willingness, respondent would have filed with the Appellate Court a limited motion

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of the Case were part of the record whether or not they appeared in respondent's Statement of Controverted Facts.

[3] *Crateo v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 2000).

[4] See *Romero v. City of Pomona*, 883 F.2d 1418, 1423 (9th Cir. 1989). Such a motion is a prerequisite to a limited motion to remand.

to remand.[5] Appellant sought the Appellate Court's judicial notice of the *Crateo* motion and the supporting evidence therein regarding the concealed evidence. Although the Appellate Court denied the request for judicial notice, respondent maintains that in the event that review of this matter is granted such evidence would be a proper part of the record.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN AUTHORITY EITHER AMONG THE CIRCUITS OR BETWEEN THE NINTH CIRCUIT AND THIS COURT WITH REGARD TO WHETHER THE CONDUCT OF THE OFFICERS IN THE INSTANT CIRCUMSTANCES WAS CLEARLY ESTABLISHED AS EXCESSIVE FORCE, SINCE ANY APPARENT DIFFERENCES ARE DISTINGUISHABLE ON THE FACTS.

In light of the long period of time that defendants placed their knees on Drummond's back, the fact that he was already cuffed and presented little threat of flight or to officer safety, that a weapons pat-down revealed no concealed weapons, that he was not stopped for committing a crime, that the officers laughed at him as they ignored his pleas to let him breathe, that they all denied under oath in deposition that he made such pleas, and that long standing police practices as well as their own department policies prohibit restraining persons in Drummond's condition in this manner, no reasonable officer could believe that they were acting lawfully. Based upon these facts, taken in the light most favorable to the

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[5] See *Jenkins v. Whittaker Corp.*, 785 F.2d 720, 722, fn.2 (9th Cir. 1986).

respondent, the Ninth Circuit held that (1) officers' alleged act of continuing to press their weight onto detainee's neck and torso as he lay handcuffed on ground and begged for air constituted use of excessive force, and (2) officers were not entitled to qualified immunity, having received fair warning via departmental policy and other means that alleged actions constituted excessive force.

The Ninth Circuit opinion in this case represents neither a conflict with this Court nor the Federal Courts of Appeal. The opinion below is consistent with *Saucier v. Katz*, 533 U.S. 194 (2001) as well as other pertinent Supreme Court authority. Given the same facts, other Circuits would be compelled to make the same ruling. The reason being that what separates the instant case from different results in different Circuits is different facts.

Petitioners would have the Court believe that case law must have held that the specific type of force used in the precise circumstance constituted a constitutional violation in order for the police officers' constitutional violation to be considered clearly established. It is not so. In *Deorle v. Rutherford*, 272 F.3d 1272, 1285-1286 (9th Cir. 2001), which is in many regards is closely on point with the instant case[6], the Ninth Circuit, citing this Court, *inter alia,* specifically addressed this issue:

> Although there is no prior case prohibiting the use of this specific type of force in precisely the circumstances here involved, that is insufficient to entitle Rutherford to qualified immunity:

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[6] *Deorle* does not involve a similar use of force but was closely on point regarding the circumstances of the plaintiff who "committed no serious offense, is mentally or emotionally disturbed, . . . , poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals". *Id.* at 1285. Plaintiff, likewise, was not stopped for crime but because of his mental state and after being cuffed presented little threat of flight or safety.

> notwithstanding the absence of direct precedent, the law may be, as it was here, clearly established. See *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (rejecting the notion that officer liability cannot exist "unless the very action in question has previously been held unlawful"). Otherwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct. When "'the defendant['s] conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.' *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir.1994) *quoting Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir.1993)). This is such a case.

This Court less than two years ago restated this same principle that an officer can still be on notice that his conduct violates established law even in novel factual circumstances:

> Our opinion in *Lanier*[7] thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier,* we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of

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[7] *U.S. v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

> cases with "materially similar" facts. Accordingly, pursuant to *Lanier,* the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.

Hope v. Pelzer, 536 U.S. 730, 741 (2002).

In *Hope*, an Eighth Amendment case, the Court stated that Alabama prison guards who had cuffed an inmate to a hitching post for long periods of time were not entitled to qualified immunity on summary judgment, despite the fact that there were no previous cases materially similar to the inmate's. *Id.* The Court reiterated that a general constitutional rule may be sufficient to give the officers fair warning that their conduct violates a clearly established right. *Id.*

Notably, the Court also looked to an Alabama Department of Corrections (ADOC) regulation and a DOJ report informing the ADOC of the constitutional infirmity in its use of the hitching post in finding that the constitutional violation was clearly established. *Id.* at 741-742. Likewise, here the multiple Anaheim policies relating to this matter and the warning of the expert in their 1998 Training Bulletin[8] regarding the deadliness of their tactic, in addition to police standards, the specific circumstances and the case law gave the officers "fair warning" that they were not acting within the confines of the law, and that therefore they were violating a clearly established right.

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[8] Anaheim Training Bulletin 98-14 'Positional Aspyxia' cites an "expert in the field" as warning that "when one or more officer's are kneeling on a subject's back or neck to restrain him, compression asphyxia can result, 'That may be a precipitating factor in causing death.'" App. 19-20.

Numerous cases in different circuits have held that circumstances similar to the present were excessive force which was not entitled to qualified immunity. For example in *Simpson v. Hines*, 903 F.2d 400, 401-404 (11th Cir. 1990), where Simpson was arrested after a confrontation with a police officer over officer's mistaken suspicion that Simpson stole his pen, was in a drug-affected state, refused to be searched and brandished marijuana, was said to have resisted causing the officers to put him in a choke hold and force him to the ground, and where a large officer nicknamed "beef" sat upon the him, "Simpson [could] be heard alternately cursing, saying 'all right, all right' asking the police to 'lighten up,' and then begging for help and screaming." The court recited the facts as including a physician's report that "Simpson could have died of asphyxiation resulting from the pressure exerted when [officer] sat on his chest [and] [d]efendants claim[ed] that such force was necessary" and the court there determined that there was "*ample evidence that the defendant officers who entered Simpson's cell reasonably should have known that in subduing and searching Simpson they maliciously used force which was grossly disproportionate to the need and was calculated to injure Simpson severely.*" *Id.* at 403 [emphasis added]. It is significant that despite Simpson's resistance and pleas, which one could try to characterize as a "ploy," the court found that the force was excessive and not protected by qualified immunity.

For other cases with similar facts where qualified immunity was not applied see: *Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) [Mildly retarded man picked up a five dollar bill that a woman had dropped in a bus station, officer used a wrestling maneuver wrenching Rowland's knee until it cracked, Rowland apparently only offered resistance in instinctively trying to protect himself, and court held that no reasonable officer could have believed his conduct to be lawful in light of the circumstances.];

Smith v. Mattox, 127 F.3d 1416 (11th Cir. 1997) [Smith raised a baseball bat in a threatening manner at police, he dropped bat and ran when officer raised his gun, when apprehended the officer pulled his arm into a position of discomfort, when Smith complained the officer used additional force breaking his arm, and the court held that, viewing the facts in the light most favorable to Smith, unlawfulness of the conduct was readily apparent even without clarifying caselaw.]; *Johnson v. City of Milwaukee*, 41 F.Supp.2d 917 (E.D.Wis. 1999) [Johnson was involved in an altercation from which the other participants fled, Officer pushed him against a fence, put Johnson into a "half-Nelson" wrestling hold, apparently struck Johnson in the teeth with his gun after which it discharged shattering Johnson's teeth and exiting through his left cheek, and court held that because Johnson committed a low level battery, posed no immediate threat and was under the officer's control the officer was not entitled to qualified immunity as he would have lost nothing by refraining from escalating the level of force.]; *Slicker v. Jackson*, 215 F.3d 1225 (11th Cir. 2000) [Handcuffed plaintiff asked officers to not hurt his neck to which officer responded with an obscenity, officers then picked plaintiff up placed him on hood of car, plaintiff lost feeling in his arm and slid off car at which time he was kicked in leg, the back and back of the head. Held excessive force and the officers were not entitled to qualified immunity.]; and *Franzell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996), *abrogated to the extent that it conflated the excessive force and qualified immunity inquiries,* [Arrestee, who was stopped for drunk driving and who suffered seizures, resisted and cursed at officers, officers continued to strike him after he was subdued with one officer on his back and the other two holding him down, court held that jury could have found that officers acted unreasonably by continuing to use force after he was subdued.]. Each of these cases are in addition

to the Ninth Circuit Court cases *Deorle*, *supra*, 272 F.3d 1272, *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1207 (9th Cir.2000) and *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002).

In the instructive Fifth Circuit case *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998), in which a detainee who died, had consumed cocaine, was in a state of delirium, was hog-tied in the prone position and transferred in a patrol car without having his breathing monitored, the court, distinguishing *Price*[9], found triable issues of facts which could establish a constitutional violation and found that qualified immunity did not apply. In that case there was no evidence to suggest that the detainee expressed his inability to breathe, that officers ignored his pleas, that officers laughed at him as they engaged in these acts, or that the officers subsequently lied about hearing his pleas[10]. Kimbrough, estimates that they had Drummond on the ground for approximately an hour. By Anaheim's own admission they had him on the ground the *second* time about 18 minutes.

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[9] *Price v. County of San Diego*, 990 F.Supp. 1230 (S.D.Cal.1998), the somewhat aberrant and widely disregarded district court case upon which Petitioners heavily rely.

[10] Two witnesses, Kimbrough and Calleja, state that Drummond told the officers he could not breathe. Calleja states he did so numerous times. Officer Valentine states she heard no such pleas. (Ramirez Dec., Exh. 6, Valentine Dep., 57:4-20). The other officers make the same denial. The facts must be taken in the light most favorable to Plaintiff and reasonable inferences in favor of Plaintiff should be taken therefrom. The reasonable inference from this conflicting testimony is that the officers are lying and are doing so to cover up their knowledge of and indifference to Plaintiff's respiratory distress. That Defendants now assert that Plaintiff's pleas were a "ploy" discloses their duplicity; if he never made the pleas of distress they could not very well be a ploy.

It is not uncommon for courts to consider the fact that police officers have laughed at or mocked plaintiffs to determine the reasonableness of their acts. [See *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991); *Liston v. County of Riverside*, 120 F.3d 965, 97 (9th Cir. 1997)]. The language in *Shaw v. Stroud*, 13 F.3d 791, 802 (4th Cir. 1994) is especially persuasive: "[N]o reasonable officer possessing Stroud's information would believe his actions – laughing at and ignoring complaints of excessive force perpetrated by an officer he supervised – to be lawful." In *Kostrzewa v. City of Troy*, 247 F.3d 633, 641 (6th Cir. 2001), a Sixth Circuit case, also instructive, the appellate court referred approvingly to its previous unpublished decision where it "affirmed the district court's denial of defendant's motion for summary judgment on the grounds of qualified immunity, stating that the facts alleged could support recovery on a claim of excessive force." The facts of the previous decision included the police officer tightening the hand cuffs to the point where Plaintiff was losing circulation and then "[u]pon removing the cuffs, the officer laughed and said: 'I guess they were on too tight!'" *Id.* *Kostrzewa* also reiterated that "**the right to be free from excessive force**, including "excessively forceful handcuffing," **is a clearly established right for purposes of the qualified immunity analysis**." *Id.* [Emphasis added]. The fact that the officers laughed as they inflicted force upon Drummond, one more distinguishing fact, further demonstrates that reasonable officers in their positions would not have considered Drummond a serious threat of injury or flight, thus the quantum of force used was not justified.

Notwithstanding the cases from other circuits, *supra,* in which immunity was not applied, petitioners, for the proposition that the Federal Circuits are in conflict with the Ninth Circuit on this matter, in their petition at pages 10-12 quote *Unzreta v. Steele*, 291 F.Supp.2d 1230, 1238-1239

(D.Kan. 2003) which cites *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997) and a number of similar cases. There are myriad facts distinguishing *Phillips* from the instant case. Unlike Drummond, it was undisputed that Phillips "was on the floor for only a few minutes." *Id.* at 594. In *Phillips* there was lacking the "additional circumstances, such as drug use or other physical problems, [which] usually contributed to the deaths in the [other] situations". *Id.* at 594, fn. 1. Officers actually monitored Phillips' breathing (*Id.* at 594), whereas they ignored Drummond's pleas of respiratory distress. Phillips "became extremely violent", had two ball-point pens in his clenched fists which he refused to drop, kicked violently and tried to bite one of the officers. *Id.* at 588-589. There were no facts suggesting Phillips complained of respiratory distress. Further, unlike the instant case, in *Phillips* "leaving Mr. Phillips face down while handcuffed comported with the Milwaukee Police Department's policies. Since Mr. Phillips' death, the policy has been amended; officers are now told to seat or stand an individual as soon as possible once the individual is restrained." *Id.* at 590. Thus in *Phillips* there was no argument that the officers were in violation of their department policies or that they had been apprised of the potential danger to Phillips.

Petitioners cite another case, *Tobias v. County of Putnam*, 191 F.Supp.2d 364 (S.D.N.Y. 2002), where, unlike Drummond, the arrestee actually violently resisted (not just cussing and squirming) by fighting, punching, kicking and biting. Moreover, the court did not find excessive force in *Tobias* "due to the absence of any significant diminished capacity" which could put the arrestee at greater risk of harm from the restraint. *Id.* at 378. The court also noted that (unlike Drummond) the arrestee "does not claim that he complained to the officer defendants about their use" of the restraint. *Id.*

Petitioners' quote also cites *Wagner v. Bay City, Tex.*, 227 F.3d 316 (5th Cir. 2000). However, there are numerous facts distinguishing that case from the instant and for finding that there was no excessive force. In that case the arrestee truly violently resisted: "[The arrestee] jumped off a stool and started swinging his fists, striking [the officer] several times." *Id.* at 318. The court also noted: "We are careful not to engage in second-guessing officers in situations in which they have to make split-second, on-the-scene decisions while confronted with a violent individual." *Id.* at 321. Drummond's circumstances were not split second but dragged out for 45 minutes after he was cuffed and knocked to the ground, nor was he violent. (Even Appellees admit that Drummond was on the ground for 18 minutes the second time). Also in *Wagner* there was no evidence that the arrestee was at risk as Drummond was: "Likewise, several of the other required conditions in the SCDS report are not present here, including the fact that there is no evidence Gutierrez was a drug user, much less that there was a risk of "cocaine psychosis." *Id.* at 324. Furthermore, in that case the court considered four potential causes of sudden custody death and found that all four plainly were not present. *Id.* 323-324.

In *Rodriguez v. Farrell,* 94 F.3d 1276, 1278 (11th Cir. 2002), also cited by Petitioners, the officer was not acting unreasonably in ignoring the arrestee's claim of an injured arm because of the context of the case including, *inter alia*, that he reasonably believed that arrestee was a fugitive who had evaded capture and because the arrestee had no obvious signs of injury. Here, the officers knew of Drummond's particular risk of harm. *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001) is also distinguishable. *Jackson* was distinguished in *Santos v. Gates*, 287 F.3d 846, 855, (9th Cir. 2002), where it was noted the officers in *Jackson* could ignore the arrestees, pleas because it had a much greater governmental interest in the application of

force, as that case involved a scene described as a "melee", where six officers faced a group of thirty to fifty citizens who refused to obey the officers' commands to disperse. This overwhelming governmental interest is lacking in the instant case.

On close examination, it is apparent that the cases in other circuits (and in the Ninth Circuit) which had different results than the *Drummond* case also had different facts. Indeed, there is indisputably no conflict between the circuits.

To borrow a phrase from the bard, petitioners' arguments regarding positional asphyxia are tales "full of sound and fury, signifying nothing."[11] *Price v. County of San Diego*, 990 F.Supp. 1230 (S.D.Cal.1998), a district court case upon which petitioners heavily rely for the proposition that the force used upon Plaintiff was not a constitutional violation, is in many regards an aberration and has been wisely disagreed with and distinguished in subsequent cases[12]. It is also factually distinguished from the present case, because Plaintiff here does not rely upon the theory of "positional asphyxia" assailed in the *Price* case. Plaintiff does not merely assert that, being in a drug induced state of "excited delirium," his injuries were caused only by being put in the prone position. Dr. Sunil Arora, Drummond's treating physician and a cardiopulmonary expert, states to a reasonable medical probability Drummond's cardiopulmonary arrest was caused by mechanical compression of his lungs. App. 17. Here, the

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[11] William Shakespeare, Macbeth, Act 5, Sc. 5, lines 26-28.

[12] *Negative treatment by Gutierrez v. City of San Antonio*, 139 F.3d 441 (5tn Cir.(Tex.) 1998); *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013 (S.D.Ohio 1999); and *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, (10th Cir. 2001).

officers actually put pressure upon Drummond's back for almost 45 minutes despite his pleas that he couldn't breathe, causing him to be unable to breathe – mechanical compression. His mental and physiological state put him at a greater risk of this – as Anaheim P.D. policy notes in several places and of which the officers, therefore, either were, or should have been, aware.

The reasoning of *Johnson v. City of Cincinnati*, 39 F.Supp.2d 1013, 1015-1017 (S.D.Ohio 1999), distinguishing and criticizing *Price*, points out that the study in *Price*, which purportedly debunked positional asphyxia claims, was itself flawed in that, among other things, it dealt only with the risk posed to healthy individuals without any affirmative use of mechanical compression and not the increased risk to individuals in a state of agitation, intoxication or delirium:

> The decision of the Honorable Judge Rhoades, Southern District of California, in *Price v. County of San Diego*, 990 F.Supp. 1230 (S.D.Cal.1998), does not change this Court's conclusion. In *Price*, Judge Rhoades concluded that the work of Dr. Donald Reay, the scientist credited with first hypothesizing the concept of positional asphyxia, had been successfully refuted by Dr. Tom Neuman, a researcher who is also Defendant City's expert in this case. See *id.* at 1237-38. Dr. Neuman attacked Dr. Reay's methodology and results. See *id.* Judge Rhoades stated that Dr. Neuman refuted both the premise that blood oxygen levels decrease after exercise – or for purposes of the case now before the Court, when a person is suffering from agitated delirium – and the ultimate conclusion that being restrained in a prone position prevents the lungs from replenishing the blood's oxygen supply. [FN2] See *id.* at 1238. According to the Price decision, even Dr. Reay now concedes that the restraint at issue was "physiologically neutral." Id.

* * *

> Because Dr. Reay's study appears to be a critical foundation of subsequent studies supporting sudden death by agitated delirium with restraint, including those by Dr. O'Halloran, the City argues that Dr. O'Halloran's report should not be considered scientific evidence. The Court disagrees and believes this is a classic "battle of the experts" situation. First, Dr. O'Halloran offers his own published study on agitated delirium with restraint as support for his conclusion regarding Wilder. In *Price*, only Dr. Reay was specifically challenged. Dr. O'Halloran's studies may not have used the same methodology found to be flawed in *Price*. Second, the University of San Diego study published by Dr. Neuman and his colleagues has its own limitations which makes questionable its application to Wilder's death. The University of San Diego study was restricted to healthy subjects. It did not attempt to duplicate field conditions. Finally, the study admitted that underlying medical conditions, intoxication, agitation, delirium, struggle, and body position could all affect respiration in a way that the study could not detect. Chan, Vilke, Neuman, & Clausen, Restraint Position and Positional Asphyxia, *Annnals* [sic] *of Emergency Medicine,* November 1997 . . . At the time of his death Wilder was obese, had tested positive for marijuana, and was suffering from agitated delirium. These factors differentiate him from the study participants. On the basis of the record before the Court at this time, the Court cannot conclude that the University of San Diego study debunks the theory of positional asphyxia to an extent rendering the testimony of Dr. O'Halloran inadmissible as scientific evidence.

The very article upon which the decision in *Price* relies was an exhibit to the Deposition Transcript of

Charles Wetli, M.D., which was lodged in support of Anaheim's Motion for Summary Judgment. The study itself also recognized its other limitations, i.e. that it did not take into account field conditions such as mechanical compression: "This study did not attempt to duplicate exact field conditions under which restraint position deaths have occurred. . . . In addition, these individuals may have been subject to forceful apprehension, during which pressure may have been exerted on their backs while they were in the restraint position. What effects these differences may have remain to be determined."

In *Johnson, supra*, the police restrained the individual in a prone position with his hands cuffed behind his back and his legs tied, and he died of "cardiac dysrhythmis" due to "agitated delirium with restraint". In *Cruz v. City of Laramie, Wyo.* 239 F.3d 1183, 1188 (10th Cir. 2001) the court noted that "[i]n *Johnson v. City of Cincinnati,* the Southern District of Ohio found sufficient information existed in the law enforcement community to **put the authorities on notice that positional asphyxia was a problem nationwide**." [Emphasis added].

In the instant case the information not only existed in the law enforcement community as noted in *Johnson* and *Cruz*, (Dusenbury says it violated standard police practice), it also existed in Anaheim's training materials at least as early as 1992. App. 19. It was the subject of at least three training bulletins and one section of the Department Manual. An Anaheim police officer could not have reasonably believed that restricting the breathing of a detainee such as Drummond by setting on his back – especially for such a long period of time after he was already cuffed – was legally permissible.

On a review of the cases, it is evident that there is an absence of any conflict in authority.

II. PETITIONERS' ASSERTION THAT THE NINTH CIRCUIT MADE A *POST HOC* ANALYSIS "BASED LARGELY ON PLAINTIFF'S COMATOSE CONDITION" TO SOMEHOW PORTRAY AN "OTHERWISE MINIMAL RESTRAINT" AS SEVERE FORCE IS A RED HERRING, AS THAT COURT APPROPRIATELY USED THE GRAHAM ANALYSIS OF FACTORS KNOWN TO THE OFFICERS AT THE TIME OF THE INCIDENT.

A plain reading of the Ninth Circuit's opinion shows that it did not simply reason from respondent's injury to the severity of the force. The officers had fair and ample warning of the deadliness and the severity of the force from multiple sources and the Appellate Court, likewise, looked to the facts surrounding the use of force and the warnings which the officers received.

Graham v. Connor, 490 U.S. 386, 396 (1989), instructs a court considering the issue of excessive force to engage in the "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." The court is to consider the government's interests as measured by "the severity of the crime at issue, the threat that the suspect poses to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting flight." *Id.*

In this case, Drummond was not stopped for a crime, he posed little threat to the safety of the officers as he was cuffed behind the back and there were at least three officers, the officers conducted a weapons pat down and found no weapons, at least one witness says he did not resist, the officers laughed as they applied the force and Drummond could not very well flee in light of the nature of his restraint and the number of the officers. In many respects this is a garden variety excessive force case where officers knocked Drummond to the ground, handcuffed

him and squeezed the life out of this mentally disturbed man for about 45 minutes while they laughed at him despite his pleas that he couldn't breathe. These facts, properly considered in an excessive force analysis, do not constitute a *post hoc* analysis

III. THE NINTH CIRCUIT COURT OF APPEALS DID NOT IN ANY WAY DRASTICALLY DEPART FROM THE STANDARD OF REVIEW ON SUMMARY JUDGMENT, AS THE APPELLATE COURT'S DECISION WOULD HAVE BEEN THE SAME EVEN ABSENT THE CONTESTED EVIDENCE.

In an attempt to frame a reviewable issue, petitioners assert that the Ninth Circuit Court of Appeals drastically departed from the standard of review on summary judgment. Yet no such departure was made by the Court. Petitioners maintain that admission of a single piece of evidence, a statement by a witness that petitioner was not resisting, amounted to this subversion of the standard of review on summary judgment.

The argument that the Court below relied "exclusively" on this evidence is a misstatement and is misleading as to the appropriate test for excessive force. Whether or not a detainee is "resisting", in the sense of engaging in any sort of defiance, is not the *sine qua non* of an excessive force inquiry. Under the *Graham*[13] test the court is to balance the "nature and quality of the intrusion" on a person's liberty with the "countervailing governmental interests at stake" to determine whether the force was objectively reasonable under the circumstances. The Appellate Court also considered the fact that respondent

[13] *Graham v. Connor,* 490 U.S. 386, 396, 109 S.Ct. 1865 (1989).

was already cuffed when the force was applied to him, the police expert's opinion that he presented little objectively reasonable threat of flight or harm after being cuffed, and the fact that he was wanted for no crime. Given these circumstances, even without the contested piece of evidence, the Appellate Court would have reached the same conclusion under Graham: the degree of force was not warranted. In actuality, the court which did ignore the standards for summary judgment was the District Court. Among numerous other errors, it made the illogical finding that the officers had no reason to believe that the respondent was in respiratory distress (Petitioners' App. 31), despite the fact that two witnesses stated that he begged for air numerous times (App. 9 and 16).

It should be noted that the disputed evidence whether or not admissible is a proper matter for consideration by respondent's police practices expert and further supported his opinion that after Drummond was cuffed he presented little objectively reasonable threat of flight or safety.

Petitioners assert that Drummond violently resisted, yet a review of the citations to the record on appeal does not show that he was violent or threatening to others. When the record citations are checked, they reveal nothing that can fairly be described as violent resistance. Pages 182-183 of the excerpts of record on appeal are Officer Ned's version of Drummond's resistance: "tried to pull away from us and stamp his feet into the ground without moving them to walk, grabbing at our uniforms with his hands from the cuffed position, still screaming and yelling." Page 155 of the record states: "Drummond continued to resist and verbally threaten the officer using a constant tirade of profanity." Pages 211-212 are merely Officer Valentine's assertion that Drummond pushed off the car with his feet when they tried to place him in it, an act which was not violent. Although there is Officer McElhaney's self-serving reference in the record, which speculates as to

Drummond's state of mind, that Drummond was trying to injure him, none of the citations to the record refer to Drummond using, attempting to use or possessing any weapon, punching, striking, biting or attempting to do any of those things to any officer. Spewing profanities, wriggling about or refusing to walk are behavior typical of the mentally ill but are not acts of violence.

The petitioners refer to Drummond kicking Officer Sawyer off of him just before he expired. Even if this alleged act could be construed as an act of violence rather than the last act of a suffocating man to save his life, it cannot be the justification for force which was applied for 40 minutes *prior* to its occurrence. Most importantly, it should be noted that petitioners' evidence of Dummond's "resistance", even if undisputed, is not sufficient given all the other facts to justify the quantum of force used.

In light of all the other facts that militated against the uses of such dangerous force, the purported error by the Appellate Court, even by the most generous construction, is at most a mere error devoid of constitutional questions. A mere error by a lower court, absent questions of concern to this Court, is not a proper basis for the granting of certiorari:

> The one reason to proceed is to achieve justice in this particular case. Even if the constitutional question presented is hypothetical as to everyone else, it would seem to be of great practical importance to these litigants. But that is ordinarily not sufficient reason for our granting certiorari – even when unnecessary constitutional pronouncements are not in the picture.

Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 122, 114 S.Ct. 1359 (1994).

Petitioners advance no persuasive rationale that this case presents the narrow class of questions which warrant review by this Court.

CONCLUSION

This case presents no conflict of law but a fact intensive matter easily distinguished from divergent cases, no derogation of this Court's authority but plain adherence, and no drastic departure from the accepted and usual course of judicial proceedings but a mere evidentiary issue which is not even essential to the lower Court's holding. As the questions raised by petitioners fall far short of requiring redress by this Court the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX INDEX

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Plaintiff's Statement Of Controverted Facts And Conclusions Of Law In Opposition To Defendants' Motion For Summary Judgment As To Plaintiff's Claims Set Forth In The Complaint, United States District Court, Central District Of California, Southern Division, Filed January 3, 2002 ..... App. 1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

BRIAN THOMAS DRUMMOND, by and through his Guardian ad Litem, THOMAS R. DRUMMOND Plaintiffs, vs. CITY OR [sic] ANAHEIM, a California municipal entity; ANAHEIM POLICE DEPARTMENT, a California municipal entity; ROGER BAKER; ANAHEIM POLICE DEPARTMENT OFFICERS, the identity and number of whom are presently unknown to plaintiff; and Does 1-10, inclusive, Defendants.	CASE NO. SA CV 00-243 AHS (ANx) PLAINTIFFS' STATEMENT OF CONTROVERTED FACTS AND CONCLUSIONS OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIMS SET FORTH IN THE COMPLAINT DATE: January 14, 2001 TIME: 10:00 a.m. COURTROOM: 10A HONORABLE ALICEMARIE STOTLER

Plaintiff hereby submit [sic] the following Plaintiffs' Statement of Controverted Facts and Conclusions of Law pursuant to Central District of California Local Rule 56 in Opposition to the Summary Judgment as to Plaintiff's Claims Set Forth in the Complaint filed by Defendants.

MOVING PARTY'S ALLEGED UNCONTROVERTED FACTS	**PLAINTIFF'S RESPONSE**
1. On March 26, 1999, Anaheim police were contacted by Drummond's neighbor Kimbrough and Creath with a report that Drummond posed a threat to the residents and to himself. (Kimbrough deposition, 24:9-25; 26:2-6)	1. Undisputed.
2. When police responded, they recognized Drummond as the same subject of a call from Drummond's girlfriend on March 25th wherein she had requested police take him into custody as a §1550 (danger to himself and other). (Ned deposition, 44:10-15; Graves deposition, 19:20-20:24; Valentine deposition, 34:6-35:3).	2. Disputed in part and undisputed in part. Undisputed that Ms. Graves called with regard to Welf. & Inst. Code § 5150. Disputed as to the implication that he presented a danger to others. Ms. Graves testified that Plaintiff had bipolar disorder, had not been taking his medication, had possibly been using narcotics and that "she wanted him to be taken into a hospital, that he needed medical help, that I was worried for him."

	(Ramirez Dec., Exhibit 1, Graves Dep. 19:11-22:16.) Plaintiff also objects that Defendants' statement misstates the law. Welf. & Inst. Code § 5150 refers not to a situation, as Defendants maintain, when a person is a "danger to himself and others" but "[w]hen any person, as a result of mental disorder, is a danger to others, **or** to himself or herself, **or** gravely disabled".
3. When police located him on a busy Anaheim street shortly before 10:00 p.m., Officers noted that Drummond was hallucinating, sweating and incoherent. (Ned deposition, 45:5-9; Valentine deposition, 34:6-35:3; Exhibit C, Call History).	3. Undisputed.
4. When police attempted to speak with him, he appeared to be moving toward the busy Magnolia Street. (Valentine deposition, 44:18-45:5).	4. Undisputed.
5. When they contacted his girlfriend to enlist her aid in calming Drummond, she refused to speak with	5. Disputed in part and undisputed in part. The officers, despite the fact that the they claimed that

Drummond. (Graves deposition, 33:24-35:19).	Drummond wanted to kill himself, wanted To return Drummond to Graves' residence or to have her transport him to the hospital. (Ramirez Dec., Exh. "2", Graves Dep. 34:16-35:12) Police expert Dusenbury states that such conduct by the officers would be misconduct. See Plaintiff's Material Facts ("PMF") 22 and 23, below.
6. With no other options apparent to them, Police on the scene therefore made a decision to take him into custody for his own safety for transportation to a local health care facility under W.I. §5150 evaluation. (Ned deposition, 52:1-16).	6. Undisputed.
7. In his agitated and clearly hallucinative state, Drummond resisted but police succeeded in placing handcuffs on him and requested an ambulance. (Ned deposition, 53:1-23; McElhaney deposition, 25:20-26:13; Exhibit C, Call History).	7. Disputed. Independent witness Victor Manuel Calleja states that Drummond was not resisting the officers. (Ramirez Dec., Exh. "3", Calleja Interview taken by D.A.'s Office, p. 2)
8. Anaheim's practice was to arrange for the transportation of violent subjects	8. Undisputed.

such as Drummond to a medical facility by ambulance, strapped to a gurney. (Rodig deposition, 65:24-66:4, 93:17-96:20).	
9. Drummond continued to resist and fight with police as they attempted to seat him in a patrol car to await the ambulance. They violent resistance. (Sic) (Ned deposition, 54:11-55:22).	9. Disputed. See No. 7, above.
10. When out of the vehicle, Drummond could easily have run away in his manic state, handcuffed or not. That danger was of great concern to officers on the scene. (McElhaney deposition, 28:13-19).	10. Disputed. After he was cuffed, he presented little objectively reasonable threat of flight or to the safety of the officers, and the cavalier, perhaps malicious, attitude of the officers. (Dusenbury Dec. ¶¶ 4, 8)
11. Drummond's continued combatativeness caused police to attempt to control him by placing Drummond on the ground to subdue him and prevent him from fleeing. (Valentine deposition, 47:6-22).	11. Disputed. Police practices expert Dusenbury opines: Although the officers maintain that placing Drummond in the prone position and placing their body weigh [sic] on his torso was necessary for their safety and to prevent his fleeing, they should have restrained him by taking him to his knees and then applying a leg restraint. He was handcuffed behind the

	back at the time. After application of a leg restraint, he could have then been placed [sic] the police vehicle, "seat-belted", and safely transported. There is no purpose to be served by placing Drummond on the ground except, momentarily, unless the officers intend to apply leg restraints. (Dusenbury Dec., ¶ 8)
12. This struggle continued on the parking lot as three officers were unable to gain Drummond's compliance or keep him safely under control without keeping him down on the ground. (Kimbrough deposition, 59:13-60:4).	12. Disputed. Independent witness Calleja, states that Drummond did not resist. See No. 7, above. Also, the method of restraining Drummond was unnecessary and constituted misconduct. See No. 11, above.
13. Officers tried a second time to place plaintiff into the patrol car, but he was too combative. (Ned deposition, 64:13-66:11).	13. Disputed. Calleja states he did not resist. See No. 7, above. Although the officers claim that they never put Drummond in the patrol car, Kimbrough testifies that they placed him in the car and then removed him and put him back on the ground. (Ramirez Dec., Exh. "4", Kimbrough Dep. 31:18-32:1)

14. Officers repeatedly requested the ambulance to get there. (Exhibit C, Call history; Valentine deposition. 59:1-7).	14. Undisputed.
15. Officer [sic] estimate that plaintiff was on the ground, the second time being restrained for approximately 18 minutes, with plaintiff struggling with them the entire time. (Valentine deposition, 55:1-25; Ned deposition, 73:24-74:25; Kimbrough deposition, 63:10-14).	15. Disputed. Kimbrough estimates that the total time they had him on the ground was for an hour. (Ramirez Dec., Exh. "4", Kimbrough Dep. 35:19-20)
16. The officers never placed their entire weight on the plaintiff, and they had their feet on the ground at all times. (Ned deposition, 71:9-16; McElhaney deposition, 36:15-25; Kimbrough deposition, 43:11-44:1).	16. Disputed. Even Kimbrough, who Dusenbury's report describes as being "pro-police", admits that Valentine put her full weight on him and that all three officers were sitting on him at the same time. (Ramirez Dec., Exh. "4", Kimbrough Dep. 32:19-21, 33:17-19)
17. They also periodically lessened the pressure they were placing on his back and shoulder area. (Kimbrough deposition, 52:22-53:7); McElhaney deposition, 38:4-23); Valentine deposition, 56:1-10).	17. Disputed. Objection misstates Kimbrough's testimony. When asked what the officers said when Drummond told them he was having a hard time breathing, Kimbrough says they just told him to relax.

	(Ramirez Dec., Exh. "4", Kimbrough Dep. 52:22-53-7) However, when asked what they did when Drummond complained of breathing problems, he says "They just – basically, ther [sic] really did nothing. I mean they kept their position." (Kimbrough Dep. 51:21-25)
18. Occasionally, plaintiff would tell the officers that he would stop, and when the officers let up, he would try to flee or injure the officers. (McElhaney deposition, 38:4-23 & 39:6-25).	18. Disputed. Calleja states that Drummond did not resist. See No. 7, above.
19. Although witnesses may have heard plaintiff state he couldn't breathe and that he wanted a glass of water, this was considered a ploy. (Kimbrough deposition, 39:12-40:3).	19. Disputed in part and undisputed in part. Undisputed that Plaintiff was unable to breathe and that he told the officers so. Calleja also stated that Plaintiff said he could not breathe and considered his pleas legitimate. (Calleja Dec.) Further it is disingenuous, and tests the credulity of the court, for Defendants to imply that they considered Plaintiff's pleas a ploy, when each of the officers dubiously denies that he made such pleas. (Ramirez Dec., Exh.

	6, Valentine Dep., 57:4-20) Defendants can not blow both hot and cold at the same time.
20. The officers had no reason to believe that plaintiff couldn't breathe. (Valentine deposition, 57:1-25, McElhaney deposition, 65-10-66:1; Ned deposition, 68:21-69:16 & 74:22-75:9).	20. Disputed. Both Calleja and Kimbrough state that Plaintiff told the officers that he could not breathe. (Calleja Dec., ¶ 5; Ramirez Dec., Exh. "4", Kimbrough Dep. 51:19-25)
21. After a fourth officer, Gregory Sawyer arrived, he tried to control the plaintiff's legs, but plaintiff kicked him away. (Sawyer deposition, 38:14-39:23).	21. Disputed in part and undisputed in part. Undisputed that Plaintiff may have done so and that Sawyer pushed Plaintiff's legs into a hogtie-like position. Disputed as to any inference that Plaintiff was acting violently – all evidence suggests that he was being asphyxiated, as he purportedly expired immediately after this kick. Plaitniff [sic] may have used his last breath to throw off Sawyer, who in addition to the weight of the other officers was lifting Plaintiff's legs off the ground so that they no longer supported their own weight, and added his own weight to that and pushed them towards his buttocks so that even greater weigh was resting

	on Drummonds torso, comprssing [sic] his lungs. (Ramirez Dec., Exh. "7", Sawyer Dep. 38:16-41:14)
22. A leg restraint was then located and used at Drummond's ankles only. As soon as his legs were restrained, Drummond suddenly became unusually docile whereupon officers determined he had lost consciousness. (Valentine deposition, 61:1-25-62:9).	22. Undisputed.
23. Officers immediately released plaintiff from the restraints, called paramedics and initiated CPR. (Valentine deposition, 63-12-20; Exhibit C, Call History).	23. Undisputed.
24. Plaintiff was ultimately revived but he sustained brain damage. (McElhaney deposition, 54:23-55:2).	24. Undisputed.
25. The plaintiff had kicked Sawyer knocking him off balance less than three minutes before paramedics were summoned to revive him. (Exhibit C, Call History; Sawyer deposition, 38:14-39:23 & 41:15-22).	25. Disputed in part and undisputed in part. See No. 21, above.

26. Significantly, the coroner's toxicological results indicated plaintiff was under the influence of cocaine and alcohol with cocaine metabolite levels of 1310 Mg/M1. (Breen deposition 14:12-16:2 with attached coroner's toxicological report).	26. Undisputed.
27. Plaintiff initially disputed the presence of illegal drugs, but his experts have now conceded the toxicology findings are correct. (Plaintiff's First Amended complaint, p.7, ¶23; Breen deposition, 8:2-6).	27. Undisputed.
28. In addition, plaintiff's fiancée testified that she ejected plaintiff from her home because she found him with a cocaine pipe in the early morning hours of March 26, the day of the incident. (Graves deposition, 25:14-26:17).	28. Undisputed.
29. She further testified that he had been released from his "drug rehab" program just a few weeks earlier. (Graves deposition, 16:1-20).	29. Undisputed.

30. Plaintiff claims (though [sic] his guardian ad litem) that he was asphyxiated by the defendant officers when they placed him face down, with handcuffs on. (Plaintiff's First Amended Complaint, p.6, ¶19, lines 10-16).	30. Disputed in part and undisputed in part. Undisputed that he was asphyxiated by the officers. Disputed that Plaitniff [sic] alleges only that it was being placed face down which caused the asphyxiation. It was most notably the weight of the officers on his back compressing his torso, causing a mechanical compression of his lungs. (See Arora and Calleja Dec.) Also, officers were informed that individuals in Plaintiff's state were at increased risk of asphyxia. (Dusenbury Dec., Manual Section and Training Bulletins Exh. 3-6)
31. The police did not strike or kick plaintiff or use any weapon on him. (Ned deposition, 113:22-114:7; Kimbrough deposition, 34:4-7).	31. Disputed. Calleja states that Ned knocked Plaintiff to the ground. (Calleja Dec. ¶¶ 2-3). Disputed also as to any inference that excessive force requires striking, kicking or use of a weapon. The officers plainly violated standard police practices as well as policies of their own department; nor reasonable police officer in their position could have mistakenly believed that

	they were acting lawfully. (See entire Dusenbury Dec., specifically ¶ 4)
32. The emergency room physician who examined the plaintiff that night found no signs of trauma to the head, neck area or torso. (Reid declaration, p.2, ¶5; Exhibit A, pp. 3-4 of West Anaheim Medical Center Emergency Room Medical report of David Reid's, M.D., physical examination of plaintiff).	32. Disputed. Plaintiff had and [sic] abrasion on his face as well as, numerous other abrasions and bruises and orthopedic injuries. The West Anaheim Medical Center Nursing List Patient Notes from March 27, 1999 note that "Patient has multiple abrassions (sic) and bruises". The Patient Admission History/ Assessment form West Anaheim Medical Center under the heading "Skin" has the box "Ecchymosis" checked and also notes "Abrasions". The Comments portion of this section states "see pictures". Copies of photographs dated "3/26/99" in the records show abrasions to the right side of Mr. Drummonds face, also to his left wrist, right elbow, left knee and one other photograph of an abrasion. There are two photographs of lacerations on his right wrist. The Patient Admission History/Assessment form under the heading

	"Musculoskeletal" has the box "Orthopedic Injury" checked and the Comments portion of this section states " (R) shoulder – pop out (R) knee injury". (Arora Dec.. ¶ 4)
33. The plaintiff continued to spew profanities at the officers from the ground until just seconds before they determined he was not responding and he required CPR. (Kimbrough deposition, 38:1-10 & 43-11-45:1).	33. Objection: irrelevant. Whether or not Plaintiff cursed is not probative of any material issue. Conduct which violates his Fourth Amendment rights, would be a violation regardless of whether he cursed ad [sic] the officers or not.
34. The sudden cessation of such conduct is what alerted officers to the possibility of a problem. (Valentine deposition, 62:1-9).	34. Disputed. It was when Plaintiff went limp that Officer Valentine checked his pulse. (Calleja Dec. ¶ 7)

PLAINTIFFS' MATERIAL FACTS

Plaintiff submits the following evidence showing that the following material facts are also in dispute:

1. Plaintiff, Brian Drummond, is a Caucasian male in his early thirties who has been in a persistent vegetative [sic] as a result of hypoxic encephalopathy from his cardiopulmonary arrest on March 26, 1999, and he is expected to remain in a vegetative state for the rest of his life. (Ramirez Dec., Exh. "1", Sunil Arora, M.D.'s 1/15/01 Report, pp. 1, 5)

2. The cardiopulmonary arrest was the result of a lack of oxygen to his heart caused by mechanical compression of his chest from police officers setting atop his back. (Arora Dec. ¶ 3)

3. Plaintiff has a history of bipolar or manic depressive disorder and schizophrenia. (Ramirez Dec., Exh. "1", Sunil Arora, M.D.'s 1/15/01 Report, pp. 1; Ramirez Dec., Exh. "2", Graves Dep. 19:11-19:13)

4. On March 25, 1999, the night before the incident upon which this matter is based, Mr. Drummond's fiancé Olivia Graves called the police because he had run out of his medication, was experiencing hallucinations and paranoia, and that she "wanted him to be taken into a hospital, that he needed medical help, that [she] was worried for him." (Ramirez Dec., Exh. "2", Graves Dep. 18:14-22, 22:14-16, and 25:6-10)

5. The officers told Ms. Graves that "they were not a taxi cab" and that they did not think Drummond fit the criteria for a psychiatric hold under Welf. & Inst. § 5150. (Ramirez Dec., Exh. "2", Graves Dep. 22:17-20)

6. The officers were acting in a "not very professional" manner, "joking around a lot", "just saying stuff to each other and laughing", and meanwhile Graves "was in a very serious emotion at that time, [she] wasn't too happy to hear them giggling and making jokes." (Ramirez Dec., Exh. "2", Graves Dep. 23:17-24:1).

7. On the evening of March 26, 1999 Victor Manuel Calleja was present when an African American officer (Officer Ned) "knock[ed] Mr. Drummond to the ground where the officers cuffed his arms behind his back as Mr. Drummond lay on his stomach." (Calleja Dec. ¶¶ 2-3)

8. Drummond was not resisting the officers. (Ramirez Dec., Exh. "3", Calleja Interview taken by D.A.'s Office, p. 2)

9. The officers left Mr. Drummond in that position, lying face down on his stomach. "A white officer (Officer McElhaney) put his knees into Mr. Drummond's back and placed the weight of his body on him. The African American officer also put his knees and placed the weight of his body on him, except that he had one knee on Mr. Drummond's neck." (Calleja Dec. ¶ 4)

10. "Mr. Drummond repeatedly told the officers that he could not breathe and that they were choking him. He also told them that he was thirsty and needed a glass of water. The officers however continued to put their weight upon Mr. Drummonds back and neck. [Calleja, the witness] was shocked and surprised that the officers continued to do this when the [sic] were obviously causing him to have trouble breathing." (Calleja Dec. ¶ 5)

11. David Kimbrough, another witness corroborates Calleja's assertion that Drummond told the officers that he couldn't breathe, and that when he said this the officers did nothing but remain in their position. (Ramirez Dec., Exh. "4", Kimbrough Dep. 51:19-25)

12. "The officers were laughing during the course of these events. When the African American officer placed his knee upon Mr. Drummond's neck and the one of the white male officers had his knees on Drummonds back the other officers stood around and laughed." (Calleja Dec. ¶ 6; Ramirez Dec., Exh. "5", Anaheim P.D. Supplemental Report re Witness: Calleja)

13. "After continuing to put the weight of their bodies on him, Mr. Drummond went limp. The female officer checked his pulse and then they removed his cuffs and turned him over. They then attempted to perform CPR on him. Then the paramedics arrived and continued trying to revive him." (Calleja Dec. ¶ 7)

14. "One of the white officers wanted to ask [Calleja] questions but [he] would not talk to him. Then another officer who had arrived later told [Calleja] that he was a supervisor and that he wanted to hear [his] side of the story. Although Spanish is [Calleja's] first language, [he] spoke to him in English. [He] told him that it was not right, what they did. Because [he] thought Mr. Drummond was dead, [he] told the officer, 'I will tell the family that you killed him." [He] also told him, 'The black guy put his knee on the back of the neck and the other officers were standing around laughing." (Calleja Dec. ¶ 8; Ramirez Dec., Exh. "5", Anaheim P.D. Supplemental Report re Witness: Calleja)

15. Sunil Arora, M.D., one of Plaintiff's treating physicians, a cardiopulmonary expert and Director of the Neurological Care Unit at the hospital where Drummond is residing and being treated opines to a reasonable medical probability that "on March 26, 1999 [Drummond] suffered a cardiopulmonary arrest caused by lack of oxygen to his heart. The lack of oxygen to his heart was caused by his inability to breathe caused by mechanical compression of his chest wall such that he could not inhale and exhale in a normal manner. I believe that this occurred when he was facedown on the ground and the police officers set upon his back preventing the anterior wall of his chest from expanding." (Arora Dec. ¶ 3)

16. Arora also notes that after the incident the medical records note that Drummond had multiple abrasions and lacerations to his right wrist. The records also noted "Orthopedic Injury" as "(R) shoulder – pop out (R) knee injury". Arora found this consistent with his opinion. (Arora Dec.. ¶ 3)

17. David Dusenbury former Deputy Chief of the Long Beach Police Department with 30 years experience as a police officer, who also conducted a "Use of Force Study" for the Chief of Police, surveying 14 California police departments opines that "the police officers used inappropriate restraining force and failed to comply with their Department policies and procedures regarding someone who is suspected of being under the influence of drugs and acting violently. A reasonable police officer would have complied with the policies of the Anaheim Police Department regarding such circumstances The reasons why reasonable police officers could not believe that they were acting appropriately in this case include the facts that there were numerous and egregious violations of standard police practice, violations of a number of Anaheim's own policies and procedures, the numerous protestations of Mr. Drummond witnessed by at least two independent witnesses that he was unable to breathe, the fact that he was not being stopped for a serious crime but because of his mental disturbance, the fact that after he was cuffed he presented little objectively reasonable threat of flight or to the safety of the officers, and the cavalier, perhaps malicious, attitude of the officers reflected by the fact that, if true, they were laughing a [sic] Drummond during the incident. Further, Anaheim's Police Department had longstanding policy for many years before the

incident which warned of putting arrestees in Drummond's state at risk of respiratory failure." (Dusenbury Dec., ¶ 4)

18. The officers actions were violations of Anaheim Police Department Manual Section 525.00, "Control and Transportation of Restrained Subjects":

-Section A., "If a subject must be maximally restrained, he shall be placed on his right or left side and maintained on his side, and his breathing shall be monitored constantly."

-Section B., "Do not place a restrained subject in a face down 'prone' position."

-Section G., 'Supervisors should make every effort to be present on the scene of these incidents.' " (Dusenbury Dec., ¶ 5, Exhibit 3 thereto, Anaheim Police Department Manual Section 525.00 [This was also exhibit 2 to the Deposition transcript of Anaheim Police Chief Roger Alan Baker]).

19. As early as 1992, more than six years before the incident, Anaheim Law Enforcement Bulletin 92-172, dealing with "Control and Transportation of Restrained Subjects" warned of the proper "[c]ontrol of violent/restive subjects suspected of being mentally disturbed or under the influence of alcohol and/or a controlled substance". Section 1 speaks of potential risk of interference with respiration and asphyxia when prisoners are transported in a prone position. Section 6 states, "After being restrained, violent/restive individuals will be constantly monitored." Section 7 states, "Supervisors should make every effort to be present on the scene of such incidents." Anaheim Training Bulletin 96-19 "Positional Asphyxia

During Law Enforcement Transport" reiterated in 1996 many of the same and similar warnings. Anaheim Training Bulletin 98-14 "Positional Aspyxia" [sic] cites an "expert in the field" as noting that '**when one or more officer's are kneeling on a subject's back or neck to restrain him, compression asphyxia can result, 'That may be a precipitating factor in causing death.'**" [Emhpasis [sic] added.] That Bulletin also warns of the danger of the prone position (albeit with regard to transportation), the need to monitor violent/restive individuals after they have been restrained, and that supervisors should make every effort to be present on the scene of such incidents. (Dusenbury Dec., ¶ 6, Exhibit 4-6 thereto, Training Bulletins 92-172, 96-19 and 98-14 [these were also exhibits to the chief of police's deposition])

20. Dusenbury also opines that Officers Ned, Valentine and McElhaney inappropriately discussed their opinions and tactics in the presence of and within the hearing distance of Brian Drummond, knowing that (including from their encounter with him the previous day) he suffered from some mental illness. Such actions likely exacerbated his paranoia and triggered reactions from him that may not otherwise have occurred. No effort was made to "talk Drummond into custody" or assure him that they were there to help him not hurt him. (Dusenbury Dec., ¶ 7)

21. Dusenbury further opines: Although the officers maintain that placing Drummond in the prone position and placing their body weigh [sic] on his torso was necessary for their safety and to prevent his fleeing, they should have restrained him by taking him to his knees and then applying a leg restraint. He was handcuffed behind the back at the time. After application of a leg restraint, he

could have then been placed the police vehicle, "seat-belted", and safely transported. There is no purpose to be served by placing Drummond on the ground except, momentarily, unless the officers intend to apply leg restraints. (Dusenbury Dec., ¶ 8)

22. On the evening of the incident, one of the officers spoke to Plaintiff's fiancé, Olivia Graves, on the phone and, despite the fact that Drummond said he wanted to kill himself, asked her to either that she take Drummond to the hospital or that they return him to her residence. (Ramirez Dec., Exh. "2", Graves Dep. 34:16-35:12)

23. Dusenbury also opines that returning Drummond to Graves' custody when he is expressing suicidal intent would also be misconduct on the part of the officers. (Dusenbury Dec., Exh. "2", p. 10, point 19(e))

24. Dusenbury has further opinions as follows: Use of continuing force on Drummond's back and neck/shoulder area was inappropriate and dangerous, particularly for suspected a mentally ill person, who was suspected of having ingested drugs. It is common knowledge among citizens and police that a sufficient amount of force exerted on the chest or back of an individual will interfere with normal breathing. Not only was this a violation of standard police practices but was also a violation of Anaheim Police Department policy. The fact that their own Department had articulated numerous times, beginning more than six years before the incident, if not earlier, a policy against interfering with the respiration of individuals such as Drummond in this manner, the officers could not reasonably claim they were mistaken as to the appropriateness of their use of restraining force. The fact that, if true, they laughed at Drummond and

ignored his pleas to let him breathe further eliminate the possibility that they could have been reasonably mistaken about their conduct. (Dusenbury Dec., ¶ 9)

CONCLUSIONS OF LAW

1. Defendants are not entitled to Qualified Immunity as a matter of law.

four months before the incident. (Ramirez Dec., Exh. 8, Defendants Answers to Special Interrogatories, p. 9)

26. Officer Sawyer had received Counseling for Unsatisfactory Performance and Use of Weapons (5/31/95), a Written Reprimand for Unbecoming Conduct, Unsatisfactory Performance (6/26/98), and a subsequent 25 hour suspension for Violation of Rules, Unbecoming Conduct, Unsatisfactory Performance and Identification (12/2/00). (Ramirez Dec., Exh. 8, Defendants Answers to Special Interrogatories, p. 9)

27. Mr. Dusenbury notes that the discipline received by Ned is just short of termination. (Dusenbury Dec., Exh. "2", p. 18, point 27(a) 1 and 2)

CONCLUSIONS OF LAW

1. Defendants are not entitled to Qualified Immunity as a matter of law.

A. There is a triable issue that facts exist which would justify a finding that the officer's conduct constituted constitutional violations.

B. There issue that facts exist which would justify a finding that the constitutional violation was clearly established.

C. The officers actions were objectively reasonable.

2. Because there was a constitutional violation, thus Defendant's sole attack on the Monell claim fails.

3. Having raised a triable issue as to constitutional violations, the plaintiff's negligent hiring and retention and remaining state law claims do not fail to state a claim.

DATED: December 31, 2001

LAW OFFICES OF FEDERICO
CASTELAN SAYRE

By: /s/ Jorge Ramirez
FEDERICO C. SAYRE
JORGE RAMIREZ
Attorneys for Plaintiffs

PROOF OF SERVICE

State of California, County of Orange

I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 900 North Broadway, 7th Floor, Santa Ana, California 92701.

On, December 31, 2001, I served the foregoing document, entitled **PLAINTIFFS' STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIMS SET FORTH IN THE COMPLAINT**, on the interested parties to this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED MAILING LIST

[X] BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] BY FAX: I transmitted the foregoing document by facsimile transmission from (714) 550-9125 to the facsimile numbers indicated on the attached mailing list. The transmission was reported as complete and without error on the transmission report which was properly issued by the transmitting facsimile machine.

[X] FEDERAL: I declare under penalty of perjury that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

EXECUTED on December 31, 2001, at Santa Ana, California.

/s/ Mary D. Halverson
Mary D. Halverson

Brian Drummond vs. City of Anaheim, et al

USDC CASE NO: SA CV 00-243 AHS (ANx)

Client File No: S1558.001

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